118-707

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1140~~. 748

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, JAMES PHILLIPS, THE REPUBLIC OF PERU, AND HENRY H. ROLLINS, APPELLANTS,

vs.

THE NATIONAL STEAM NAVIGATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 21, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1149.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, JAMES PHILLIPS, THE REPUBLIC OF PERU, AND HENRY H. ROLLINS, APPELLANTS,

vs.

THE NATIONAL STEAM NAVIGATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 At a stated term of the circuit court of the United States of America for the eastern district of New York, held at the United States court-rooms in the city of Brooklyn, on the 1st day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: Hon. Samuel Blatchford, circuit judge.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, and JAMES PHILLIPS

vs.

THE NATIONAL STEAM NAVIGATION COMPANY.

The appeal from the decree of the district court having come on to be heard on the pleadings and proofs taken in the district court, and on further proofs taken in this court, and the proctors for the respective parties having been heard, and due deliberation having been had: Now, on motion of Scudder & Carter, proctors for the libellants herein, it is ordered, adjudged, and decreed that the decree of the district court herein, in so far as it awarded dam-

2 ages to the libellants, Joseph W. Dyer, William Leavitt, Samuel P. Shaw, and James Phillips, be, and the same is hereby, affirmed, and that the said libellants recover from the respondents, The National Steam Navigation Company, for the loss of the ship "Kate Dyer," her tackle, apparel, etc., the sum of fifty-six thousand dollars, together with interest thereon at the rate of six per cent. per annum from Dec. 1, 1866, being the sum of thirty-nine thousand two hundred dollars, amounting together to the sum of ninety-five thousand two hundred dollars ($95,200.00), and that they recover for the loss of the freight on the cargo of said ship the sum of twenty-six thousand five hundred and twenty-seven $\frac{51}{100}$ dollars, in gold coin of the United States, together with interest thereon from Dec. 1st, 1866, at the rate of 6 per cent. per annum, being the sum of eighteen thousand five hundred and sixty-nine $\frac{25}{100}$ dollars, in gold coin of the United States, and amounting together to the sum of forty-five thousand and ninety-six $\frac{76}{100}$ dollars, in gold coin of the United States ($45,096.76).

3	And that they recover for the personal effects of William G. Leavitt, master of said ship "Kate Dyer," lost with her, the sum of	$2,270 20
	And interest thereon from Dec. 1st, 1866, at 6 per cent., being	1,589 40
	And for the personal effects of Ansel L. Dyer, 2nd officer of said ship, the sum of	919 50
	And interest thereon from Dec. 1st, 1866, at 6 per cent., being	643 65
	And for the personal effects of John McGowan, seaman on said vessel, the sum of	200 00
	And interest thereon from Dec. 1st, 1866, at 6 per cent., being	140 00
	And for the personal effects of Frederick Williams, seaman on said vessel, the sum of	160 00

And interest thereon from Dec. 1st, 1866, at 6 per cent., being	$112 00
And for the personal effects of Thomas Tracy, seaman on said vessel, the sum of	138 00
And interest thereon from Dec. 1st, 1866, at 6 per cent., being	94 60
And for the personal effects of George Gates, seaman on said vessel, the sum of	103 50
And interest thereon from Dec. 1st, 1866, at 6 per cent., being	72 45
And for the personal effects of Patrick Cassidy, seaman on said vessel, the sum of	103 50
And interest thereon from Dec. 1st, 1866, at 6 per cent., being	72 45
4 And for the personal effects of John Butler, seaman on said vessel, the sum of	100 00
And interest thereon from Dec'r 1st, 1866, at 6 per cent., being	70 00
And for the personal effects of Charles Bayley, seaman on said vessel, the sum of	90 00
And interest thereon from Dec. 1st, 1866, at 6 per cent., being	63 00
And for the personal effects of John Janken, seaman on said vessel, the sum of	80 00
And interest thereon from Dec. 1st, 1866, at 6 per cent., being	56 00
And for the personal effects of Robert Fisk, seaman on said vessel, the sum of	70 00
And interest thereon from Dec. 1st, 1866, at 6 per cent., being	49 00
And amounting in all to the sum of seven thousand one hundred and ninety-seven $\frac{25}{100}$ dollars	$7,197 25

And it is further ordered that the libellants recover the sum of $2,173.10, the amount of the decree for costs in the district court.

And on motion of Benedict, Taft & Benedict, proctors for the co-libellant, Henry H. Rollins, it is ordered that the decree of the district court awarding damages to the said Henry H. Rollins be, and the same is hereby, affirmed, and that the said co-libellant
5 recover for the loss of his property on board said ship against the National Steam Navigation Company the sum of five thousand seven hundred and twenty dollars, in gold coin of the United States, with interest thereon at 6 per cent. from said Dec'r 1st, 1866, being the sum of four thousand and four dollars, in gold coin of the United States, and amounting in all to the sum of nine thousand seven hundred and twenty-four dollars, in gold coin of the United States, together with his costs, taxed at the sum of ——— dollars.

And on motion of Prichard & Smith, proctors for the co-libellant,

The Republic of Peru, it is further ordered, adjudged, and decreed that the decree of the district court awarding to the said co-libellant, The Republic of Peru, the sum of $94.302.67 for its damages, be reversed as to the amount, and that the said co-libellant, The Republic of Peru, recover for the loss of said cargo against The National Steam Navigation Company, respondent, the sum of fifty-seven thousand three hundred and seventy-five $\frac{92}{100}$ dollars, in gold coin of the United States, with interest at the rate of 6 per cent. per annum from September 1st, 1866, being the sum of forty-one
6 thousand and twenty-three $\frac{77}{100}$ dollars, in gold coin of the United States, and amounting together to the sum of ninety-eight thousand three hundred and ninety-nine $\frac{69}{100}$ dollars, in gold coin of the United States, ($98,399.69).

And on motion of all the above-named proctors it is further ordered that unless this decree be fulfilled or satisfied, or unless proceedings thereon be stayed on appeal by filing security within ten days after service of a copy of this decree upon the proctor for the respondents, then that Isaac M. Wright, Samuel L. M. Barlow, and Emil Heinemann, the stipulators for value herein in the district court, and Samuel L. M. Barlow and William Butler Duncan, the sureties on appeal herein to this court, and Charles G. Cornell, Edward Annan, John D. Keiley, Jr., Robert Bennett, Richard M. Leviness, Fealy C. Niebuhr, and Owen Dennett, the additional sureties furnished on said appeal under order of the court, cause the engagement of their stipulations to be performed, or show cause within four days after the expiration of the said ten days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels, and lands.

SAM'L BLATCHFORD.

Endorsed: Decree. Filed and entered August 2nd, 1878.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Whereas lately in the circuit court of the United States for the eastern district of New York, before you or some of you, in a cause between Joseph W. Dyer, William Leavitt, Samuel P. Shaw, and James Phiilips, libellants and appellants, and The National Steam Navigation Company, respondent and appellee; The National Steam Navigation Company, claimant and appellant, and Joseph W. Dyer, William Leavitt, Samuel P. Shaw, James Phillips, Henry H. Rollins, and The Republic of Peru, libellants and appellees; and The Republic of Peru, libellant and appellant, and The National Steam Navigation Company, respondent and appellee, wherein the decree of the said circuit court entered in said cause is in the following words, viz:

"The appeal from the decree of the circuit court having
8 come on to be heard on the pleadings and proofs taken in the district court, and on further proofs taken in this court, and

the proctors for the respective parties having been heard, and due deliberation having been had: Now, on motion of Scudder & Carter, proctors for the libellants herein, it is ordered, adjudged, and decreed that the decree of the district court herein, in so far as it awarded damages to the libellants, Joseph W. Dyer, William Leavitt, Samuel P. Shaw, and James Phillips, be, and the same is hereby, affirmed, and that the said libellants recover from the respondents, The National Steam Navigation Company, for the loss of the ship "Kate Dyer," her tackle, apparel, etc., the sum of fifty-six thousand dollars, together with interest thereon at the rate of six per cent. per annum from Dec'r 1st, 1866, being the sum of thirty-nine thousand two hundred dollars, amounting together to the sum of ninety-five thousand two hundred dollars ($95,200), and that they recover for the loss of the freight on the cargo of said ship the sum of twenty-six thousand five hundred and twenty-seven $\frac{51}{100}$ dollars, in gold coin of the United States, together with interest thereon from Dec'r 1st, 1866, at the rate of 6 per cent. per annum, being the sum of
9 eighteen thousand five hundred and sixty-nine $\frac{25}{100}$ dollars, in gold coin of the United States, and amounting together to the sum of forty-five thousand and ninety-six $\frac{76}{100}$ dollars, in gold coin of the United States ($45,096.76).

And that they recover for the personal effects of William G. Leavitt, master of said ship "Kate Dyer," lost with her, the sum of	$2,270 20
And interest thereon from Dec'r 1st, 1866, at 6 per cent., being	1,589 40
And for the personal effects of Ansel L. Dyer, 2nd officer of said ship, the sum of	919 50
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And for the personal effects of Thomas Tracy, seaman on said vessel, the sum of	138 00
And interest thereon from Dec'r 1st, 1866, at 6 per cent., being	94 60
And for the personal effects of George Gates, seaman on said vessel, the sum of	103 50
10 And interest thereon from Dec'r 1st, 1866, at 6 per cent., being	72 45
And for the personal effects of Patrick Cassidy, seaman on said vessel, the sum of	103 50
And interest thereon from Dec'r 1st, 1866, at 6 per cent., being	72 45

And for the personal effects of John Butler, seaman on said vessel, the sum of	$100 00
And interest thereon from Dec'r 1st, 1866, at 6 per cent., being	70 00
And for the personal effects of Charles Bayley, seaman on said vessel, the sum of	90 00
And interest thereon from Dec. 1st, 1866, at 6 per cent., being	63 00
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And interest thereon from Dec'r 1st, 1866, at 6 per cent., being	56 00
And for the personal effects of Robert Fisk, seaman on said vessel, the sum of	70 00
And interest thereon from Dec'r 1st, 1866, at 6 per cent., being	49 00
And amounting in all to the sum of seven thousand one hundred and ninety-seven $\frac{25}{100}$ dollars	$7,197 25

And it is further ordered that the libellants recover the sum of $2,173.10, the amount of the decree for costs in the district court.

11 And on motion of Benedict, Taft & Benedict, proctors for the co-libellant, Henry H. Rollins, it is ordered that the decree of the district court awarding damages to the said Henry H. Rollins be, and the same is hereby, affirmed, and that the said co-libellant recover for the loss of his property on board said ship against the National Steam Navigation Company the sum of five thousand seven hundred and twenty dollars, in gold coin of the United States, with interest thereon at 6 per cent. from said Dec'r 1st, 1866, being the sum of four thousand and four dollars, in gold coin of the United States, and amounting in all to the sum of nine thousand seven hundred and twenty-four dollars, in gold coin of the United States, together with his costs, taxed at the sum of —— dollars.

And on motion of Prichard & Smith, proctors for the co-libellant, The Republic of Peru, it is further ordered, adjudged, and decreed that the decree of the district court awarding to the said co-libellant, The Republic of Peru, the sum of $94,302.67 for its damages, be reversed as to the amount, and that the said co-libellant, The Republic of Peru, recover for the loss of said cargo against the National Steam Navigation Company, respondent, the sum of fifty-seven

12 thousand three hundred and seventy-five $\frac{92}{100}$ dollars, in gold coin of the United States, with interest thereon at the rate of 6 per cent. per annum from September 1st, 1866, being the sum of forty-one thousand and twenty-three $\frac{77}{100}$ dollars, in gold coin of the United States, and amounting together to the sum of ninety-eight thousand three hundred and ninety-nine $\frac{69}{100}$ dollars, in gold coin of the United States ($98,399.69).

And on motion of all the above-named proctors it is further ordered that unless this decree be fulfilled or satisfied, or unless pro-

ceedings thereon be stayed on appeal by filing security within ten days after service of a copy of this decree upon the proctor for the respondents, then that Isaac M. Wright, Samuel L. M. Barlow, and Emil Heineman, the stipulators for value herein in the district court, and Samuel L. M. Barlow and William Butler Duncan, the sureties on appeal herein to this court, and Charles G. Cornell, Edward Annan, John D. Keiley, Jr., Robert Bennett, Richard M. Leviness, Fraley C. Niebuhr, and Owen Dennett, the additional sureties furnished on said appeal under order of the court, cause the engagements of their stipulations to be performed, or show cause within four days after the expiration of the said ten days, or
13 on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels, and lands"—

As by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States, by virtue of an appeal taken by the National Steam Navigation Company and a cross-appeal taken by Joseph W. Dyer, William Leavitt, Samuel P. Shaw, James Phillips, and Henry H. Rollins, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-one, the said cause came on to be heard before the said Supreme Court on the said transcript of record on appeal and cross-appeal and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be affirmed, except so far as it condemns the respondents to pay the whole amount of damages sustained by the libellants and intervenors, and as to that portion thereof that the said de-
14 cree be, and the same is hereby, reversed; and it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with instructions to modify its said decree and take such further proceedings as may be necessary to carry out the principles laid down in the opinion of this court.

Each party to pay the costs of their respective appeals in this court.

20TH MARCH, 1882.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeals notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the nineteenth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed: Nos. 40 & 43, October term, 1881. Mandate Supreme Court United States. Filed and entered this 29th day of June, 1882.

15 *Bill of Exceptions.*

Circuit Court of the United States for the Eastern District of New York.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, and JAMES Phillips, Libellants, and the Republic of Peru and Henry H. Rollins, Co-Libellants,

vs.

THE NATIONAL STEAM NAVIGATION COMPANY, Respondent.

The mandate of the Supreme Court of the United States issued herein having been filed, on the 5th day of June, 1883, an interlocutory decree was made in the above-entitled cause by the Honorable Samuel Blatchford, Associate Justice of the Supreme Court of the United States, and entered herein on the 7th day of June, 1883, in the words and figures following:

At a stated term of the circuit court of the United States
16 for the second circuit held for the eastern district of New York at the United States court-rooms in the city of Brooklyn on the 5th day of June, 1883.

Present: Hon. Samuel Blatchford, Associate Justice of the Supreme Court of the United States.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, and JAMES Phillips, Libellants; The Republic of Peru and Henry H. Rollins, Intervenors,

against

THE NATIONAL STEAM NAVIGATION COMPANY, Respondent.

On reading and filing the mandate of the Supreme Court of the United States issued in the above-entitled action, and also the petition of the libellants herein, and after hearing counsel for the respective parties, it is ordered, adjudged, and decreed that the decree heretofore entered in this action in this court on the second day of August, 1878, be reversed, so far as it condemns the respondent
17 to pay the whole amount of damage sustained by the libellants and the intervenors, and that the said decree be in all other respects affirmed.

And it is further ordered that reference be had to B. Lincoln Benedict, Esquire, one of the commissioners of this court, to ascertain the proper amount to be paid by the respondent as depending upon the value of the articles saved from the Scotland, including the pending freight or passage money.

And the libellants herein having moved for leave to file a further and supplemental allegation to their libel herein, relating to alleged insurance upon the Scotland and her pending freight, and that reference also be had to said commissioner to take testimony as to the amount of any insurance held by the respondents herein upon the said ship Scotland or her freight at the time of the collision in question and the terms thereof.

18 And the respondents insisting that insurance is in nowise included in the decision of the Supreme Court, and is not

within its mandate nor within the issues involved in the present case, and that this court has no power to allow the introduction of the question of insurance at this stage of the case, or to allow such supplemental pleading, or to order testimony to be taken on that subject before the commissioner, it is also ordered that the libellants be allowed to file such supplemental allegation, and that the respondents may make such answer thereto as they may be advised, within twenty days from the service on them of a copy of such allegation and of this order; and that on the hearing before the commissioner, hereby ordered, either party be allowed to give such evidence in reference to the matters averred in such supplemental allegation as they may be advised, and that said commissioner
19 make his report with the said evidence to this court with all convenient speed.

But this order is made without concluding the respondents by the allegation in said petition, and without prejudice to their right or privilege to insist that the question of insurance is wholly irrelevant in this case, or that such question has been disposed of by the judgment and mandate of the Supreme Court herein, or that no order should now be made permitting the filing of supplemental allegations or the taking of proofs concerning insurances, or that this court has no power to make such order allowing such supplemental allegation, and referring the subject of insurance to the commissioner and authorizing him to take evidence thereupon.

SAM'L BLATCHFORD.

And thereafter, and on or about the 10th day of July, 1883, the libellants filed their supplemental allegations to their libel
20 herein in the words and figures following:

U. S. Circuit Court.

JOSEPH W. DYER *et al. vs.* THE NATIONAL STEAM NAVIGATION CO.

The libellants and co-libellants in the above cause, as a further and supplemental allegation to the allegations in their libel herein, aver:

That in reference to any claim of the respondents to limit their liability to the value of the steamship "Scotland," the respondents above named, as the libellants are informed and believe, at the the collision in the libel herein alleged, held divers and sundry policies of insurance upon the said steamship "Scotland" in the libel herein named, by virtue of which the said respondents were insured against the results of the collision with the ship "Kate Dyer"
21 in the said libel named, and against the claim of these libellants therefor, and against loss and damage to the "Scotland" arising from all perils of the sea. And that the value of the steamship "Scotland" to the respondents at the time of the collision in question and thereafter was more than the amount of such insurance, which amount as these libellants are informed and believe, is not less than the total amount of the damages sustained by the libellants herein by reason of said collision.

And the libellants further allege that the said respondents have

been paid, as the libellants are informed and believe, by the said insurers, who had made such insurance, a large sum of money on account of the loss of the said steamship "Scotland," and have received the full value of said steamship, and more than the amount of the loss of the libellants, or are entitled to have and receive the same.

22 And the libellants allege that, by reason of the premises, they are entitled to payment by the respondents of the full amount of the damages sustained by them by reason of said collision, or to the payment of such amount thereof as should be determined to have been the value of said steamship "Scotland" to the respondents in view of the insurance held by them upon her, or to the amount of said insurance collected and received by the respondents, or which they may be entitled to collect and receive under any and all policies of insurance held by them upon the said steamship, besides the amount of proceeds of the wreck of said steamship "Scotland."

Wherefore the libellants pray, as in and by their libel they have already prayed.

SCUDDER & CARTER,
Proctors for Libellants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

23 James C. Carter, of the city of New York, being duly sworn, says: That he is one of the proctors for the libellants in the above-entitled cause, and has read the foregoing allegation designed as supplementary to the original libel herein, and that the same is true to the best of his knowledge, information, and belief.

JAMES C. CARTER.

Sworn to before me, this 6th day of July, 1883.
[L. S.] LAWRENCE KNEELAND,
Notary Public, Kings County.

Cert. filed in N. Y. Co.

To which the respondent has filed no answer.

Thereafter the matters referred to the said commissioner came on for hearing before him, and on the 23d day of May, 1884, the said commissioner filed his report in the words and figures following:

Commissioner's Report.

United States Circuit Court, Eastern District of New York.

JOSEPH W. DYER *et al.*

vs.

24 THE NATIONAL STEAM NAVIGATION COMPANY.

To the Hon. Chas. L. Benedict, judge of the district court of the United States for the eastern district of New York:

In pursuance of a decretal order of reference made and entered in

the above-entitled cause, by which it was referred to one of the commissioners of this court to ascertain the value of the articles saved from the Scotland, including the pending freight or passage money, and also the amount of any insurance held by the respondents on said ship Scotland at the time of the disaster, and the amount thereof received and report thereon to the court:

I, B. Lincoln Benedict, U. S. commissioner, to whom the matter was referred, do respectfully report—

That I have been attended on such reference by the proctors for libellants and respondents and their witnesses, and have taken
25 and examined the proofs offered in evidence, and thereupon report as follows:

That the value of the articles saved from the steamship Scotland is the sum of $4,927.85, made up as follows:

Proceeds of sale at auction prior to Feb. '68		$375 00
Proceeds of sale, Feb., '68		2,144 48
Proceeds of sale of wreck, July 27, '68		870 00
		3,389 48
Less expenses of sale		345 64
		3,043 84
Property transferred without sale, £387 3 7 @ $4.866		1,884 01
		$4,927 85

That the pending freight money of the said ship Scotland at the time of the collision amounted to £2,816 2 3, $13,703.20. That of this amount a sum equal to $11.50 only had been received by the owners of the Scotland; that the remainder was to be paid on delivery of cargo, and that the ship carried none of her cargo to the place of destination.

26 That the passage-money of the said steamship Scotland for the trip on which the collision occurred amounted to		$1,703 65
Of which there was refunded to passengers		225 00
		1,478 65
Paid as expenses of transhipping and board		566 83
Nett receipts from passengers		$911 82

That the amount of insurance upon said steamship Scotland, held by the respondents at the time of the disaster, was £63,500 0 0, and that the respondents collected thereof within nine months the sum of £61,647 13 0, equal at $4.866 to the sum of $299,867.46.

All of which is respectfully submitted.

B. LINCOLN BENEDICT,
U. S. Comm'r.

May 23, 1884.

27 U. S. Circuit Court, Eastern District of New York.

JOSEPH W. DYER and others

vs.

THE NATIONAL STEAM NAVIGATION COMPANY.

F. W. J. HURST, being sworn, deposes as follows:

In November, 1866, I was managing agent of The National Steam Navigation Company, and so continued until August, 1867. The National Steam Navigation Company owned the steamship Scotland. The steamship Scotland left the port of New York on Saturday, the first of December, 1866. She had cargo on board on freight. She had passengers on board paying passage.

(Objected by respondents' as to payment of passage money.)

I have the copy of freight list of steamer.

(Respondents' counsel objects to any evidence as to freight unless it is proved that the freight was earned.)

28 The total amount of freight by list is £2,816 2*s* 3*d*., of $11.50 was paid in advance for three barrels of apples, two barrels, and three packages; the rest of the freight was to be paid on delivery of cargo at port of destination to the company.

The amount of passage money of the Scotland was $1,703.65; this was paid in advance of her sailing to the company.

All of the business of the steamer Scotland at the time stated was done under my supervision as managing agent.

Cross-examined:

None of the freight was earned.

(Objected to, by appellants.)

The failure to earn the freight was caused by the loss of the vessel.

(Same objection.)

The steamship carried none of her cargo to the port of destination. The passengers were boarded in New York and reshipped to Liverpool, their passages being paid by the company; $225 of
29 passage money was refunded to certain passengers who would not wait to be forwarded by the company. The company paid for forwarding the other passengers by the Queen, another vessel of the same line. The accounts of the Queen were separately kept and stated. There was an expense charge against the owners of the Scotland of $566.83 for the expense of bringing the passengers to New York, and taking care of them before they were reshipped. Irrespective of the carriage of the passengers by the Queen, the company paid return passage money $225, and expenses, as above mentioned, $566.83, aggregating $791.83. The balance of the passage money received was credited to the Queen for the carriage of the passengers. The entries were made as follows: The Scotland debited with gross amount and Queen credited, and Queen debited with expenses and money refunded. There were expenses beyond those I have stated, but I cannot give the figures.

30 Redirect:

Both the Queen and Scotland belonged to the same company entirely, so that all expenses and profits eventually went to or came from the same company.

F. W. J. HURST.

Sworn to before me, this April 24, 1877.
[L. S.]
ADAM GOS,
Notary Public, N. Y. Co.

31 U. S. Circuit Court, Eastern District of New York.

JOSEPH W. DYER and others, *et al.*,
versus
THE NATIONAL STEAM NAVIGATION COMPANY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Francis W. J. Hurst, being duly sworn, on his oath says: That he is and has been since prior to December 1st, 1866, the attorney in fact and sole managing agent in the United States of the above-named respondent, and that the value of the steamship Scotland, her tackle, apparel, etc., immediately prior to the date of the collision between her and the ship Kate Dyer, was at least the sum of one hundred thousand pounds sterling.

F. W. J. HURST,

Sworn to before me, this July 2nd, 1884.
ADAM GOSS,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

It is agreed that the above affidavit may be considered as one of the proofs in cause introduced by the respondents, and to be considered by the circuit court in finding the facts.

SCUDDER & CARTER,
Proctors for Libellants.

32 U. S. Circuit Court, Eastern District of New York.

JOSEPH W. DYER *et al.*
vs.
THE NATIONAL STEAM NAVIGATION COMPANY.

The libellants, for the purposes of proof of the fact, but saving and reserving all objections as to its materiality or relevancy, admits that there was marine insurance upon the ship "Kate Dyer" in the sum of fifty-nine thousand five hundred dollars, and upon the freight of said vessel the sum of thirty-seven thousand dollars, which sums were received by the libellants, the owners of said ship, within nine months after said collision.

This stipulation may be given in evidence before the court or upon the reference before B. Lincoln Benedict, or any other commissioner to whom this cause may be referred.

SCUDDER & CARTER,
Proc. for Lib'ts.

33 U. S. Circuit Court, Eastern District of New York.

JOSEPH W. DYER *et al.*
vs.
THE NATONAL STEAM NAVIGATION COMPANY.

The respondent, for the purposes of proof of the fact, but saving and reserving all objections as to its materiality or relevancy, admits that the steamship "Scotland," at the time of the collision herein, was insured in the sum of sixty-three thousand five hundred pounds sterling, marine insurance, against sea perils, and that such insurance included insurance against collision, or the effects thereof, commonly called the collision clause, a copy of which is hereto annexed, and that after the collision in this case the respondent collected and received within nine (9) months after the said collision upon the said insurance the sum of sixty-one thousand six hundred and forty-seven pounds thirteen shillings.

This stipulation may be given in evidence before the court or upon the reference before B. Lincoln Benedict, or any other commissioner to whom this cause may be referred.

34 "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of eight pounds per ton, or if the value hereby declared amounts to a larger sum, then to such declared value, and in cases where the liability of the ship has been so contested, with our consent in writing, we will also pay a like proportion of three-fourths parts of the costs thereby incurred or paid; provided also that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury to the individuals for any cause whatever."

JOHN CHETWOOD,
Proct. Resp'd't.

35 U. S. Circuit Court, Eastern District of New York.

JOSEPH W. DYER *et al.*
vs.
THE NATIONAL STEAM NAVIGATION COMPANY.

It is further admitted that there was saved from the wreck of the Scotland, besides the articles sold at auction, linen, plate glass, &c., of the value of three hundred and eighty seven pounds three shillings and seven pence (£387 3 7) which was delivered to respondent.

JOHN CHETWOOD,
Proct. for Resp't.

U. S. Circuit Court, Eastern District of New York.

JOSEPH W. DYER *et al.*
vs.
THE NATIONAL STEAM NAVIGATION COMPANY.

The evidence and stipulations on the reference herein may be submitted to the com'r without further notice and without argument.

36 May 20th, 1884.

SCUDDER & CARTER,
Proc. for Lib'ts.
JOHN CHETWOOD,
Proct. Resp'd't.

That thereafter the said cause came on to be heard before the Hon. Samuel Blatchford, Associate Justice of the Supreme Court, on the 5th day of June, 1884, upon the suppelmental allegations to the bill, the report of the commissioner herein, and the exceptions filed by the respondent thereto, and the foregoing depositions of Francis W. J. Hurst, and the foregoing agreements, admissions, and stipulations of the respective parties; and the counsel for the libellants, on the 3d day of July, 1884, filed with the said judge the following proposed findings of fact and conclusions of law, with the request that the said judge should make the said findings of fact and conclusions of law:

37 *Proposed Findings for Libellants.*

U. S. Circuit Court, Eastern District of New York.

JOSEPH W. DYER *et al.*
against
THE NATIONAL STEAM NAVIGATION COMPANY.

This cause having been brought to a hearing in this court on the — day of ——, 1884, upon the decretal order of reference made therein on the seventh day of June, 1883, the supplemental allegations of the libellants, made pursuant to said order, and the report of the commissioner pursuant to said order, with the evidence taken by him and counsel for the respective parties having been heard, the court finds and decides the following as matters of facts:

1. That at the time of the collision in the libel alleged the respondent, the owner of the steamship "Scotland," held sundry policies of marine insurance upon said steamship, by virtue of which the interest of said respondent in said steamship and said respondent were insured against all loss and damage arising from all perils of
38 the sea, and, among other things, were insured against the results of the collision with the ship "Kate Dyer" in the libel named and against the claim of the libellants therefor.

2. That the amount of such insurance at the time of said collision was the sum of £63,500, and that the respondent within nine months

after said collision collected and received on account of said insurance from the underwriters issuing such policies the sum of £61,647 13*s.*, equal to the sum of $299,867.46, on account of the loss of said steamship caused by said collision.

3. That said respondent has received from the articles saved from said steamship, and from the wreck of said steamship the value thereof, viz., the sum of $4,927.85, on or before the 27th day of July, 1868.

4. That the freight pending at the time of said collision was the sum of $13,703.20, of which the sum of $11.50 only had been received by the said respondents, and that the remainder of the same was to be paid on delivery of the cargo, and that said "Scotland" carried none of her cargo to the place of destination.

5. That the passage-money of passengers on said steamship at the time of said collision, and therefore received by said respond-
39 ent, was the sum of $1,703.65.

And the court further finds and decides the following as conclusions of law:

Conclusions of Law.

1. That the value of the interest of the respondent, the owner of said steamship "Scotland," at and after the collision aforesaid, was as much as the amount received as aforesaid on account of the insurance aforesaid, and for the articles and wreckage saved as aforesaid, amounting altogether to the sum of $304,795.31, and that this aggregate sum was received on or before the 6th day of August, 1867.

2. That the amount and value of the pending freight to be considered in ascertaining whether the liability of the respondents for the loss and damage occasioned by said collision is limited was at and after said collision the sum of $15,406.85.

3. That the amount of the loss and damage of the libellants herein for which the said respondents were liable was less than the value of the interest found as aforesaid of said respondents in the said steamship "Scotland."

4. That the libellants are entitled to recover of said respond-
40 ent the loss and damage sustained by them by reason of said collision, as ascertained and determined by the decree of the circuit court herein made and entered on the second day of August, 1878, and are entitled to a decree therefor.

And thereafter, and on or about the 9th day of July, 1884, the said judge, having taken time to deliberate, filed in the office of the clerk of the said circuit court the following findings of fact and conclusions of law made and signed by him, to wit:

U. S. Circuit Court, Eastern District of New York.

JOSEPH W. DYER *et al.*
vs.
THE NATIONAL STEAM NAVIGATION COMPANY.

This cause having been brought to a hearing in this court on the

fifth day of June, 1884, upon the decretal order of reference made therein on the seventh day of June, 1883, the supplemental allegations of the libellants made pursuant to said order, and the
41 report of the commissioner pursuant to said order, with the evidence taken by him, and the counsel for the respective parties having been heard, the court finds and decides the following as—

Matters of Fact.

1. That the value of the articles saved from the wreck of the "Scotland" (not including freight or passage-money) is the sum of $4,927.85, which was realized by the respondent on or before July 27th, 1868.

2. That the freight for the voyage on which the collison occurred amounted to $13,703.20, no part of which was paid except $11.50, and no part of which was earned, and that no part of the cargo was carried by the ship to its destination.

3rd. That the passage-money received for the voyage on which the collision occurred amounted to $1,703.65, of which $225 was refunded directly to the passengers, $566.83 was expended for transhipping and board of passengers at the port of New York, and $911.82 was paid for the transportation of the passengers to their destination on the steamship "The Queen," a vessel belonging to the respondent, which three several amounts last mentioned are the sum total of the passage-money for said voyage on which said collision occurred.

42 4th. That immediately prior to the time of the collision set forth in the libel the value of the steamship "Scotland," her tackle, apparel, &c., was at least £100,000 sterling.

5th. That at the time of such collision the respondent held policies of insurance on the said steamship "Scotland," whereby the respondent was insured to the amount of £63,500 against the perils of the sea, including collision or the effects thereof, as expressed in the clause which is annexed to a stipulation signed by the proctor for the respondent, and filed May 23, 1884. That within nine months after such collision respondent collected from the underwriters for such insurance the sum of £61,647.13, equal to, at $4.866 to £1, to $299,867.42.

6th. That at the time of such collision the libellants held policies of insurance on the ship "Kate Dyer" and her freight, whereby they were insured to the amount of $96,500 against the perils of the sea. That within nine months after such collision libellants collected from the underwriters for such insurance the whole of said sum of $96,500.

And the court further finds and decides as matters of law—

43 1. That the proper amount to be paid by the respondent as depending upon the value of the articles saved from the wreck of the "Scotland" is the sum of $4,927.85.

2nd. That there was no freight or passage-money realized on the said voyage of the "Scotland" on which said collision occurred.

3rd. That the amount of insurance effected and existing either

upon the "Kate Dyer" or the "Scotland" at the time of the collision described in the libel is wholly immaterial and irrelevant to the issue in this suit.

4th. That the amount of insurance effected and existing upon the steamship "Scotland" at the time of the collision, and collected, forms no part of the interest of the respondent in said steamship or her value to be surrendered by the respondent in limitation of its liability as fixed by the decree in this suit by reason of the collision with the "Kate Dyer."

5th. That the libellants are entitled, under the interlocutory decree of this court in their favor, upon the merits made August 2nd, 1878, to a final decree for the said sum of $4,927.85.

SAM'L BLATCHFORD,
Circuit Justice.

44 And thereafter, and upon notice of the filing of the said findings of fact and conclusions of law, and on the 21st day of July, 1884, being before the entry of any judgment or decree thereon, the libellants filed in the office of the clerk of the circuit court and served upon John Chetwood, Esq., proctor for the respondent, with notice of filing, the following exceptions to the conclusions of law made and filed by the said judge, and also the following exceptions to the refusal of the said judge to make the conclusions of law submitted and proposed to him on behalf of the libellants, and which the libellants requested him to make, as being fully proved by competent and relevant testimony:

Exceptions of the Libellants to Findings and Conclusions of Law of the Circuit Court herein.

Circuit Court of the United States for the Eastern District of New York.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, and JAMES PHILLIPS, Libellants, and THE REPUBLIC OF PERU and HENRY H. ROLLINS, Co-Libellants,

vs.

THE NATIONAL STEAM NAVIGATION COMPANY, Respondent.

45 I. Libellants except to the first conclusion of law to the effect that the proper amount to be paid by respondent as depending upon the value of the articles saved from the wreck of the "Scotland" is only the sum of $4,927.85, and claim and insist that to such amount interest from the date of said collision should be added, or, if not from said date, then from July 27th, 1868.

II. Libellants except to the second conclusion of law, to the effect that there was no freight or passage-money realized on said voyage of the "Scotland" on which said collision occurred, and claim and insist that the amount of freight and passage-money pending at the time of said collision were the sums of $13,703.20 freight money and $1,703.65 passage-money, mentioned in the second and third findings of fact, and that the same are proper amounts

to be paid by the respondent as depending upon the amount of pending freight.

III. Libellants except to the third conclusion of law herein, to the effect that the amount of insurance effected upon the "Scotland" is wholly immaterial and irrelevant to the issue in this suit.

IV. Libellants except to the fourth conclusion of law, to the effect that the amount of insurance effected and existing upon the steamship "Scotland" formed no part of the interest of the re-
46 spondent in the steamship "Scotland," or her value to be surrendered by the respondents in limitation of its liability by reason of the collision with the "Kate Dyer," and claim and insist that such insurance was a part of the interest of said respondent in said steamship and to be surrendered by it.

V. Libellants except to the fifth conclusion of law to the effect that the libellants are entitled to a final decree for only the sum of $4,927.85, and claim and insist that they are entitled to a decree for the whole amount of the loss and damage sustained by them, as ascertained and determined by the decree of this court herein made and entered on the 2d day of August, 1878.

VI. And libellants except to the refusal of this court to find and decide, as matter of law, that the value of the interest of the respondent in the steamship "Scotland" at and after the collision with the "Kate Dyer" was as much as the amount received by said respondent on account of the insurance on said steamship, and for the savings thereof.

VII. And libellants except to the refusal of the court to find and decide, as matter of law, that the amount of the pending freight to be considered in ascertaining to what sum the liability of the re-
47 spondent for the loss and damage occasioned by said collision is limited, was at and after said collision the sum of $15,406.85.

SCUDDER & CARTER,
Proctors for Libellants, Owners, and Crew of the Ship "Kate Dyer."
BENEDICT, TAFT & BENEDICT,
Proctors for Co-Libellant, Henry H. Rollins.
PRICHARD & SMITH,
Proctors for Co-Libellant, Republic of Peru.

And in order that said exceptions may properly appear in the record of the said circuit court the proctors of s'd libellants and co-libellants have prepared and caused this bill of exceptions, upon due notice to the proctor of the respondent, to be settled as the record thereof, according to the form and practice of this court, and to be signed and filed.

(S'g'd) SAM'L BLATCHFORD. [L. S.]

Endorsed: Bill of exceptions. Filed August 28, 1884.

48 At a stated term of the circuit court of the United States for the eastern district of New York, held at the court-rooms, in the city of Brooklyn, in said district, on the 20th day of September, A. D. 1884.

Present: Hon'ble Samuel Blatchford, Associate Justice of the Supreme Court of the United States.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, and JAMES Phillips, Libellants; The Republic of Peru and Henry H. Rollins, Intervenors,

versus

THE NATIONAL STEAM NAVIGATION COMPANY, Respondent.

An interlocutory decree having been entered herein on the fifth day of June, 1883, upon the mandate of the Supreme Court of the United States, in and by which decree it was, among other things, ordered that reference be had to B. Lincoln Benedict, Esqr., one of the commissioners of this court, to ascertain the amount to be paid by the respondent as depending upon the value of the articles saved from the "Scotland," including the pending freight or passage-money;

And the report of the said commissioner, together with the
49 proofs taken by him, having been filed, and this cause coming on to be heard upon the supplemental allegations to the libel (allowed by the said interlocutory decree to be filed by the libellants and intervenors), and upon the said report of the commissioner and the proofs taken by him, and the exceptions to said report filed by the respondent;

And the court having, among other things, found that the proper "amount to be paid by the respondent as depending upon the value of the articles saved from the wreck of the Scotland is the sum of $4,927.85; that there was no freight or passage-money realized on the said voyage of the Scotland on which the collision occurred; that the amount of insurance effected and existing, either upon the Kate Dyer or the Scotland, at the time of the collision described in the libel as wholly immaterial and irrelevant to the issue in the suit; that the amount of insurance effected and existing upon the steamship Scotland at the time of the collision and collected forms no part of the interest of the respondent in said steamship or
50 her value, to be surrendered by the respondent in limitation of its liability, as fixed by the decree in this suit, by reason of the collision with the Kate Dyer, and that the libellants are entitled, under the interlocutory decree in their favor upon the merits, made August 2nd, 1878, to a final decree for the said sum of $4,927.85:"

It is now ordered, adjudged, and decreed that the respondent pay into the registry of this court the sum of four thousand nine hundred and twenty-seven and $\frac{85}{100}$ dollars as the value of the strippings and remnants of the Scotland; and also the sum of two thousand one hundred and seventy-three $\frac{10}{100}$ dollars, the costs of the libellants and intervenors in the district court, as taxed, together with the sum of ninety-nine $\frac{80}{100}$ dollars, their costs in this court in this proceeding as taxed, amounting in all to the sum of seventy-two hundred and $\frac{75}{100}$ dollars; that upon such payment the respondent be discharged from all liability to the libellants and intervenors by reason of the matters alleged in the libel, and that the clerk of this court dis-

tribute the said sum, when paid, among the libellants and
51 intervenors according to their respective rights and interest.

And it is further ordered that unless this decree be fulfilled or satisfied, or an appeal be taken therefrom within the time limited by law, Isaac M. Wright, Samuel L. M. Barlow, and Emil Heinemann, the stipulators for value herein; the said Samuel L. M. Barlow and William Butler Duncan, the sureties on the appeal to this court; Charles M. Cornell, Edward Annan, John D. Keiley, Jr., Robert Bennett, Richard M. Leviness, Fraley C. Niebuhr, and Oren Dennett, the additional sureties on the appeal to this court, and David Bingham, Hugh Allen, Daniel Toffey, and Charles M. Fry, the sureties on the appeal to the Supreme Court of the United States, cause the engagement of their respective bonds and stipulations to be performed.

SAM'L BLATCHFORD.

Endorsed: Final decree. Filed and entered this 22d day of September, 1884.

52 Supreme Court of the United States.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, and JAMES PHILLIPS, Libellants and Appellants; THE REPUBLIC OF PERU and HENRY H. ROLLINS, Co-Libellants and Appellants,

vs.

THE NATIONAL STEAM NAVIGATION COMPANY, Respondents and Appellees.

To the honorable the Supreme Court of the United States:

The appeal of Joseph W. Dyer, William Leavitt, Samuel P. Shaw, and James Phillips, libellants and appellants, and The Republic of Peru and Henry H. Rollins, co-libellants, respectfully shows to this court:

The mandate of this court herein having been filed in the circuit court of the United States for the eastern district of New York on the 5th day of June, 1883, an interlocutory decree was made herein by the Hon. Samuel Blatchford, associate justice of the Supreme Court of the United States, and entered in the said circuit court, whereby it was ordered, adjudged, and decreed that the decree heretofore entered in the circuit court herein on the 2nd day of August, 1878, be reversed so far as it condemns the respondent to pay the whole amount of damage sustained by the libellants and co-libel-
53 lants, and that the said decree be in all other respects affirmed; and further ordering that reference be had to B. Lincoln Benedict, Esq., one of the commissioners of the said circuit court, to ascertain the proper amount to be paid by the respondent as depending upon the value of the articles saved from the "Scotland," including the pending passage-money; and the libellants having moved for leave to file a further and supplemental allegation to their libel relating to alleged insurance upon the "Scotland" and her pending freight, and that it be referred to said commissioner to take testimony as to the amount of any insurance held by the re-

spondents upon the said steamship "Scotland," or her freight, at the time of the collision in question and the terms thereof; and the respondents insisting that insurance is in no wise included in the decision of this Supreme Court, and is not within its mandate nor within the issues involved in said case, and that the said circuit court had no power to allow the introduction of the question of insurance at that stage of the case, or to allow such supplemental pleading, or to order testimony to be taken on that subject before the the commissioner, it was in and by the said interlocutory decree further ordered that the libellants be allowed to file such supplemental allegation, and that the respondents might make such answer thereto as they might be advised, within twenty days from the service on them of a copy of such allegation and of the said order, and that on the hearing before the commissioner thereby ordered either party be allowed to give
54 such evidence in reference to the matters averred in such supplemental allegation as they might be advised, and that said commissioner make his report with the said evidence to the said circuit court with all convenient speed; but that the said order is made without concluding the respondents by the allegations in said petition and without prejudice to their right or privilege to insist that the question of insurance is wholly irrelevant in said case, or that such question has been disposed of by the judgment and mandate of this Supreme Court, or that no order should then be made permitting the filing of the supplemental allegations or the taking of proofs concerning insurances, or that the said circuit court had no power to make such order allowing such supplemental allegations, and referring the subject of insurance to the commissioner, and authorizing him to take evidence thereupon. That thereafter, and on or about the 10th day of July, 1883, the libellants and appellants filed their supplemental allegations to their said libel, in which it was alleged as therein contained, to which said supplemental allegations these appellants ask leave to refer for the contents thereof, and that the respondents have filed no answer thereto.

That thereafter the matters referred to B. Lincoln Benedict, Esq., the said commissioner, came on for hearing before him, and that on or about the 23d day of May, 1884, the said commissioner filed his report in the office of the clerk of the said circuit court. That
55 thereafter, and on or about the 5th day of June, 1884, the said cause came on to be heard in the said circuit court before the Hon. Samuel Blatchford, Associate Justice of the Supreme Court of the United States, upon the supplemental allegations to the libel, the report of the commissioner, and the testimony and proofs annexed thereto and forming part thereof, and such proceedings were had in the said circuit court that thereafter and on or about the 22nd day of September, 1884, the said circuit court made a final decree in the said cause whereby it was decreed that the respondent pay into the registry of the said circuit court the sum of $4,927.55 as the value of the strippings and remnants of the "Scotland," and also the sum of $2,173.10, the costs of the libellants and intervenors in

the district court as taxed, together with the sum of $99.08, their costs in the said circuit court; amounting in all to the sum of $7,200.03. That upon such payment the respondent be discharged from all liability to the libellants and intervenors by reason of the matters alleged in the libel; and that the clerk of the said circuit court distribute the said sum when paid among the libellants and intervenors, according to their respective rights and interests; and further, that unless the said decree be fulfilled or satisfied, or an appeal be taken therefrom within the time limited by law, the several sureties cause the engagements of their respective bonds and stipulations herein to be performed, which said decree of the circuit court is, as these appellants are advised, in part erroneous and ought to be reversed.

56 Wherefore these appellants appeal from so much of said decree of the circuit court as fails to allow interest upon the sum of $4,927.85, the value of the strippings and remnants of the "Scotland," from the date of said collision, being the 1st day of December, 1866, to the date of said decree, and from so much thereof as fails to allow interest upon the amount of costs in the district court as taxed, from the 17th day of July, 1874, the date of the decree in the district court, and also from so much thereof as fails to direct that the respondent herein pay into the registry of the circuit court the sum of $299,867.46, the amount of insurance collected by the respondents upon the steamship "Scotland," together with interest from the 1st day of September, 1867, the time of the collection of the same, and that the clerk of the circuit court distribute the amount so paid among the libellants and intervenors, according to their respective rights and interests. And these appellants pray that the said decree of the circuit court and the pleadings, proofs, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew upon said pleadings and proofs, and that the said decree of the circuit court may be reversed in so far as it is erroneous, and a decree made that appellants recover against the said respondents the amount of damages sustained by them, with costs, or such other decree as to the said Supreme

57 Court shall seem just.

SCUDDER & CARTER,
Proctors for Libellants & Appellants.
BENEDICT, TAFT & BENEDICT,
Proctors for Co-Libellant Rollins, Appellant.
PRITCHARD & SMITH,
Proctors for Co-Libellant, The Republic of Peru, Appellant.

Endorsed: Petition of appeal. Filed October 2, 1884.

58 Circuit Court of the United States for the Eastern District of New York.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, and JAMES PHILLIPS, Libellants and Appellants, and the Republic of Peru and Henry H. Rollins, Co-Libellants and Appellants,

versus

THE NATIONAL STEAM NAVIGATION COMPANY, Respondent and Appellee.

Know all men by these presents, that we, Henry J. Scudder and George A. Black, both of the city of New York, are held and firmly bound unto the National Steam Navigation Company in the sum of five hundred dollars, to be paid to the said National Steamship Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 30th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

59 Whereas the above-named Joseph W. Dyer and others have prosecuted an appeal to the Supreme Court of the United States from certain portions of a decree rendered by the circuit court of the United States for the eastern district of New York in the above-entitled suit:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their said appeal to effect and answer all costs if they fail to make their said appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

HENRY J. SCUDDER. [L. S.]
GEO. A. BLACK. [L. S.]

Sealed and delivered & taken & acknowledged, this 30th day of Sept., 1884, before me--

LAWRENCE KNEELAND,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Henry J. Scudder and George A. Black, being duly sworn, severally deposes and say: That they are residents and freeholders within the State of New York, and are worth the sum of one thousand

60 dollars over and above all their just debts and liabilities.

HENRY J. SCUDDER.
GEO. A. BLACK.

Sworn to before me, this 30th day of Sept., 1884.

[L. S.] LAWRENCE KNEELAND,
Notary Public, Kings County.

Cert. filed in N. Y. Co.

Thereby consent that the within bond be approved.

JOHN CHETWOOD,
Proctor Respondent.

The foregoing bond is approved as to form and amount and sufficiency of sureties.

SAMUEL BLATCHFORD,
Oct. 9, 1884. *Circuit Justice.*

Endorsed: Bond on appeal. Filed October 11th, 1884.

61 UNITED STATES OF AMERICA, } ss:
Eastern District of New York, }

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York in the second circuit, do hereby certify that the foregoing pages, numbered from one to sixty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Joseph W. Dyer, William Leavitt, Samuel P. Shaw, and James Phillips, libellants and appellants, *versus* The National Steam Navigation Company, respondents, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York in the second circuit, this 11th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the 109th.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

62 By the Honorable Samuel Blatchford, Associate Justice of the Supreme Court of the United States, to the National Steam Navigation Company, respondents:

Whereas Joseph W. Dyer, William Leavitt, Samuel P. Shaw, and James Phillips, libellants, and the Republic of Peru and Henry H. Rollins, co-libellants, have lately appealed to the Supreme Court of the United States from a portion of a decree lately rendered in the circuit court of the United States for the eastern district of New York in the second circuit, made in favor of said Joseph W. Dyer, William Leavitt, Samuel P. Shaw, and James Phillips, libellants, and the Republic of Peru and Henry H. Rollins, co-libellants, and against the National Steam Navigation Company, stating that said decree is in part erroneous, and praying that the same be reversed in part, and having filed the security required by law:

Now, therefore, you are hereby cited to appear before the said Supreme Court, at the city of Washington, in the District of Columbia, on the fourth Monday of October, 1884, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York in the second circuit, the ninth day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

SAM'L BLATCHFORD.

63 (Endorsed:) U. S. Supreme Court. Joseph W. Dyer *et al.* *vs.* The National Steam Navigation Company. Citation. Scudder & Carter, proctors for libellants and appellants, 66 Wall street, N. Y. Benedict, Taft & Benedict, proctors for co-libellants, Henry H. Rollins, 64 Wall st., N. Y. Prichard & Smith, proctors for co-libellants, Republic of Peru, 21 Nassau st., N. Y. Due service of a copy hereof admitted. N. Y., Oct. 10, 1884. John Chetwood, proct. resp'd't.

64 Supreme Court of the United States.

JOSEPH W. DYER, WILLIAM LEAVITT, SAMUEL P. SHAW, and JAMES PHILLIPS, Libellants; the Republic of Peru and Henry H. Rollins, Co-Libellants, Appellants,

vs.

THE NATIONAL STEAM NAVIGATION COMPANY, Respondent and Appellee.

It is hereby consented that service of the citation on the appeal herein may be made within less than thirty days from the return day thereof, and the thirty days' notice required by the statute is hereby waived.

JOHN CHETWOOD.

65 [Endorsed:] Supreme Court of the United States. Joseph W. Dyer *et al. vs.* The National Steam Navigation Company. Stipulation waiving 30 days' notice.

66 [Endorsed:] U. S. Supreme Court. October Term, 1884. Joseph W. Dyer, William Leavitt, Samuel P. Shaw, and James Phillips, libellants and appellants, and the Republic of Peru and Henry H. Rollins, co-libellants and appellants, *versus* The National Steam Navigation Company, respondent and appellee. Transcript of record. In admiralty to the circuit of the United States for the eastern district of New York.

Endorsed on cover: E. New York C. C. U. S. No. 1149. Joseph W. Dyer, William Leavitt, Samuel P. Shaw, James Phillips, The Republic of Peru, and Henry H. Rollins, appellants, *vs.* The National Steam Navigation Company. Filed 21st October, 1884.

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Supreme Court of the United States.

JOSEPH W. DYER ET ALS., Libellants;
THE REPUBLIC OF PERU ET AL., Co-libellants.

AGAINST

THE NATIONAL STEAM NAVIGATION COMPANY.

Brief for Libellants on Claim for Interest on the Sum to which the Respondents liability is limited, if limited to savings of the vessel, and to right to interest on the decree of the Circuit Court for costs of the District Court from the date of the decree of the Circuit Court.

Point I. The statute limited simply the *original claim* for damages and did not extend to *costs* and *interest.*

There has been, in this case, no transfer of the property saved from the wreck to a trustee, and Sec. 4283 of the Revised Statutes is the only one that applies.

This Court, in Norwich Company vs. Wright says: "The Act of Congress seems to have been drawn with "direct reference to all these previous laws, and with "them before us its language seems to be not difficult "of construction."

Norwich Co. vs. Wright, 13 Wal., 104, at p. 120.

The Court refers to 53 Geo. III. C. 159, S. 1, which limited the liability of the owners, in case of collision, to the value of "the ship, appurtenances and freight."

Under this Act of Geo. III. it was decided that in addition to the value of "ship, appurtenances and freight," the claimant was entitled to the *costs* of his action and *interest* on such value up to the time of final decree.

Lord Stowell, in the case of the Dundee, 2 Hagg, Adm. 136, says: "The sufferer is further entitled to "such costs as he shall incur in recovering this value, "and to *interest if payment is delayed.* The claimant "is entitled to remuneration for the costs to which he "is driven for recovering his loss; they certainly form "a part of that loss, and the statute is not guilty of "that injustice, which would ensue if it excluded those "costs that are necessary for replacing the sufferer in "a just state of compensation. * * * And it was "justly remarked, that if, without payment of interest, "the wrongdoer could retain the money due to the "sufferer, he might apply it to the purposes of an un-"just and persevering litigation."

The same has been held repeatedly under the English Acts subsequent to this and to our own, viz.: The Merchant Shipping Act, § 504 (1854) and The Merchant Shipping Act Amendment (1862), the principle being that "*The lein attaches the moment the injury has been "inflicted.*" And as Wood, V. C., remarks in Straker vs. Hartland, "*It was quite clear that justice required "that a debt which was due but the payment of which "was delayed should carry interest.*"

African Steamboat Co. vs. Swanzy, 25 L. J. N. S. Ch., 870.

Gen. Iron Screw Collier Co. vs. Schurmanns, 29 L. J. Ch., 877.

Nixon vs. Roberts, 30 L. J. Ch., 844.

Straker vs. Hartland, 34 L. J. Ch., 122.

Smith vs. Kirby, L. R. 1 Q. B. D., 131.

In the Northumbria, L. R., 3 Ad. & Ec., 6, the Court says:

"*The statutory limit took the place of restitutio in "integrum, the principle still remains that the liability "to this amount attaches from the time of the collision; "and* THERE SEEMS NO REASON WHY INTEREST SHOULD NOT "ACCRUE ON THE DELAY TO PAY THAT LIMITED AMOUNT AS "WELL AS IN THE CASE WHEN THE AMOUNT IS UNLIMITED."

Point II. Interest should be computed at 6 per cent. from the date of collision to the date of final decree.

If interest is given at all the natural period is from the time the principal falls due to the time when the debtor ceases to have the use of it.

Point III. By the decree of the Circuit Court entered in this cause on the first day of August, 1878, the costs of the District Court, amounting to $2,173.10, were awarded to the libellants. (See p. 2 of the Record).

By the mandate of this Court, bearing date the 19th of May, 1882, the decree of the Circuit Court *was affirmed* with the exception as to the amount of damages, and with instructions to the Circuit Court to modify the decree above mentioned, so as to conform to the opinion of this Court. (See p. 6, fol. 14 of the Record).

The decree of the Circuit Court entered upon said mandate on the 22d of September, 1884, provided that the respondents should be discharged upon payment of $2,173.10, the costs of the libellants and intervenors in the District Court as taxed (see p. 19 of the Record), and this became the final decree.

Libellants sought to enter the decree in a form to entitle them to interest from the date of the decree affirmed by this Court, and have given notice of their intention to review the failure of the Circuit Court to give interest in the said final decree on the amount of the costs awarded in the District Court, which being affirmed by the original decree of the Circuit Court, and by the mandate of this Court, so far as costs were concerned, entitled the libellant to interest on those costs in the final decree to be entered upon the said mandate. (See notice of app., fol. 56 of the Record).

The original decree of the Circuit Court, which awarded these costs in 1878, having been affirmed by this Court in that respect, interest on those costs followed as a matter of right, and a new decree being required to be entered in conformity to the opinion, those costs, *with interest*, should have formed the amount to be recovered on that decree.

JAS. C. CARTER,
Counsel for Appellants.

U. S. Supreme Court.

JOSEPH W. DYER *et al*,
Appellants,

vs.

THE NATIONAL STEAMSHIP CO.,
Appellee.

No. 1149.

BRIEF IN BEHALF OF HENRY H. ROLLINS, A CO-LIBELLANT AND APPELLANT.

STATEMENT.

This case comes before this Court a second time. The case is one for collision, and was brought by the owners of the ship *Kate Dyer*, her cargo, etc., to recover the damages occasioned by her being sunk in a collision with the steamship *Scotland*, belonging to the respondents, which occurred on the high seas on the night of December 1st, 1866.

Rollins was a passenger in the *Kate Dyer* and lost everything.

The lower Courts having decreed in favor of the libellants, for the full amount of their damages, $255,047.70, of which sum, the damages of the co-libellant, Rollins, was $9,724, the respondents brought the case to this Court by appeal from those decrees. This Court, while sustaining the decrees of the lower Courts, so far as holding the *Scotland* solely in fault for the collision, held that her own-

ers were entitled to a limitation of their liability as given by the Statutes of the United States, and sent the case back to the Circuit Court of the Eastern District of New York, for proceedings to ascertain the amount to which the liability of the respondents should be limited.

Such proceedings having been taken, and the limit of the liability of the respondents having been, by the decree of the Circuit Court, fixed at $4,927.25, and a decree rendered in favor of the libellants for that amount with costs, the libellants have taken this appeal from such decree.

And this appeal presents to the consideration of this Court two questions.

I. The Circuit Court having found the facts to be that the value of the wreckage of the *Scotland* (she having been lost as a result of this collision), was the sum of $4,927.85; and also that, at that time, the respondents were insured on the *Scotland*, and had collected, of such insurance, the sum of $299,867, within nine months after the collision in question, the libellants insist that, in fixing the limit of the liability of the respondents, to which limitation they are held entitled under the Statute, the amount of that insurance should be taken as part of the value of that interest of the owners of the *Scotland;* and that, as the amount of the insurance which the respondents have received for their vessel is $299,867, which is far more than the amount of damages decreed to the libellants by the former decree of the Circuit Court, the libellants should now have a decree against the respondent for the full amount of such damages, $255,047.70, with interest and costs.

II. The libellants insist that, if they are wrong in the above contention, and if the limit of the liability of the respondents is to be fixed at the value of the wreckage only, excluding the insurance, still the amount decreed against the respondents now

should be fixed, by adding to the value of such wreckage ($4,927.55) interest thereon from the date of the collision to the date of the decree.

And, in support of these contentions, the counsel for the co-libellant, Rollins, present the following

POINTS.

First.—When this case was before this Court on a former occasion, the Court adverted to "the rule "of the general maritime law of Europe," which "only charges innocent owners to the extent of "their interest in the ship for the acts of the master "and crew," so that "if the ship is lost their lia- "bility is at an end," and to the text of the French Ordinance as formulating the old customary law, to wit: "The owners of ships are responsible for the "acts of the master, but they become discharged "therefrom by abandoning the ship and freight."

And the Court proceed to say further:

"But whilst this is the rule of the general mari- "time law of Europe, it was not received as law in "England nor in this country until made so by "statute. The English statutes indeed have not "yet adopted to its full extent the maritime law on "this subject. They make the owners responsible "to the value of ship and freight at the time of the "injury (that is, immediately before the injury), "although the ship be destroyed, or injured by the "same act, or afterwards in the same voyage, whilst "our law adopts the maritime rule of graduating "the liability by the value of the ship after the in- "jury, as she comes back into the port, and the "freight actually earned, and enables the owners to

"avoid all responsibility by giving up ship and "freight, if still in existence, in whatever condition "the ship may be, and without such surrender sub- "jects them only to a responsibility equivalent to the "value of the ship and freight as rescued from the "disaster. But whilst the rule adopted by Congress "is the same as the rule of the general maritime "law, *its efficacy as a rule depends upon the stat- "ute, and not upon any inherent force of the mari- "time law.* As explained in the *Lottawana* (21 "Wall., 558) the maritime law is *only so far opera- "tive as law in any country as it is adopted by the "laws and usages of that country*; and this par- "ticular rule of the maritime law had never been "adopted in this country until it was enacted by "Statute. *Therefore, whilst it is now a part of our "maritime law it is nevertheless statute law, and "must be interpreted and administered as such.*"

The case as it then stood before the Court presented no question as to insurance upon the vessel, but only the question in relation to the vessel and freight considered without regard to insurance.

Second.—But it will doubtless be claimed that under the views declared by this Court on that question, the Court will be bound to determine the present question by the rule of the general maritime law of Europe concerning it, if there be such a rule; and it will be contended also that there is such a rule, and that that rule excludes insurance from consideration in determining the liability of the owner.

It will, of course, have to be accepted as stated by this Court in the extracts above quoted, that this part of our maritime law is "statute law and must

"be interpreted and administered as such"; but still it will be urged that there is "a rule of the general maritime law of Europe" on this question which the Statute also adopts, just as this Court has declared that it "adopts the maritime rule of gradu-"ating the liability by the value of the ship after "the injury as she comes back into port, and the "freight, actually earned; and enables the owners "to avoid responsibility by giving up ship and "freight, if still in existence, in whatever condition "the ship may be"; and that the maritime rule so adopted is that, if there be insurance on the vessel, the owners need not give that up; and that our law without any "surrender, subjects them only to a "responsiblity equivalent to the value of the ship "and freight as rescued from the disaster" *exclusive of insurance.*

And so language, used to express with force and clearness the Court's construction of the Statute, under circumstances where the mere matter of vessel and freight were in mind, will be claimed to be decisive of the important question which now comes before this Court for its consideration for the first time.

Third.—But we are quite clear that the utterances of this Court, in the cases where the Court has had in view only the ship and freight and not insurance, are not to be applied to the case where there is insurance to be considered, except so far as they may indicate a general course of reasoning applicable to the one case as well as to the other.

Fourth.—The question now to be considered is not one like that pertaining merely to the ship and freight considered merely as such, and as to which

the broad and fundamental distinction exists between the rule as declared by the English Statutes and English decisions thereon, on the one hand, and the maritime rule of Europe on the other; but it is one of those incidental questions in the maritime law of European nations which has sprung up since the original rule came into operation, and which could not have been considered in the formation of the rule, for the reason that insurance was a thing not then known.

Had insurance then been practiced as it is now, the rule might and doubtless would have been modified thereby.

In the case of The *Rebecca*, Ware, 200, et seq., the custom of limitation of the responsibility of owners is referred to as traceable to "the contract of *commande*, *commenda*, or *commendum*, as it is variously written;" and it is said (p. 201): "This "form of contract was probably suggested by the "extreme perils attending on commercial opera- "tions in those ages of barbarism and disorder, "and more particularly on those of maritime com- "merce."

And it is further said (p. 201): "This contract was "the more important in maritime commerce, as the "*contract of insurance, which has so great an* "*influence in giving extension to commerce in our* "*time, was then unknown.*"

Doubtless the views of those jurists, who have contended, since insurance came into vogue, that the rule should be so construed or modified as to take insurance into account, so far as the matter has come under discussion, have had to contend with the difficulty of securing the application of the principle of a rule to a new state of facts; but if the views entertained by them are sound, then the fact (if it be the fact) that they have not wholly succeeded in securing their adoption in European countries, ought not to prevent this Court, in interpreting a statute of our country upon the subject,

from adopting such a rule as it conceives to be most in accordance with the spirit and meaning of the statute considered in its own proper force and in view of its own distinctive language and terms.

What should be the rule is a matter that has been in dispute among European nations ; and it is hardly possible to believe that Congress intended to do otherwise than to leave such questions to be settled by this Court in construing and applying the statute to cases as they might arise, without control from any real or supposed rule on the subject existing on the continent of Europe, and without influence from any supposed purpose on the part of Congress to adopt any such European rule.

We may not be justified in claiming that this Court intended to indicate its approval, as a just and proper rule, of the views quoted in Norwich Company *vs.* Wright, 13 Wallace, 117, from Pardessus, thus : "The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight; *and if they are lost, it suffices* for his discharge to surrender all claims in respect of the ship and its freight, *such as insurance*," &c.

But we venture to assume that it did not strike the Court as anything unreasonable or unlikely that the rule should require the surrender of insurance.

In Brown *vs.* Wilkinson, 15 M. & W., 396, Baron Parke clearly considers the rule to be as stated by Pardessus, for he uses this language : "The two latter" (referring to counsel) "contended that the object of the Statute 53 Geo. 3, C. 159, S. 3, was to give to British shipping all the protection which the navigation of some foreign states extended to theirs, and this protection goes to the extent of permitting the owners, at the end of the voyage, to give up the vessel in its then state by way of satisfaction to the parties injured, and if it be lost, the owners are altogether exempt, *on abandoning the benefit of insurance*, if any, and salvage."

Here, at least, we have a very able judge and jurist stating what he understood to be the rule of some foreign nations which required the surrender of the benefit of insurance.

He further says: "It may indeed be true that the Legislature, in giving relief by the series of statutes on this subject, ending with 53 Geo. 3, have had the foreign codes in view, but they certainly have not introduced the whole of those codes. There is not a word in the statute protecting the ship-owner from all liability, if his ship be lost, or requiring him to give up the benefit of any policies of insurance under any circumstances whatever. All that is done is to restrict the liability of the ship-owner to the value of the ship and freight, *at some time*, but no more" (page 398).

The divers claims in relation to the rule on the point in question that do obtain or should obtain among the nations of Europe are adverted to under a subsequent point of this brief, and we will not in this connection refer to that subject further than to say, that the conflicting views advanced upon it seem to us necessarily to lead to the conclusion, that the true rule is to be declared by this Court as a matter of independent construction of the language and terms of our statute, whereby it shall thus be engrafted upon and made a part of our maritime law, whether it agrees or does not agree with what may be or may become the maritime law of some other countries.

Fifth.—Turning now to the statute, we observe

1. That terms are selected and adhered to in it which are peculiar to itself, and are such as should be construed according to their own just force and meaning.

2. Section 4283 declares the limit of liability in general and absolute terms so that the limitation is in no wise dependent upon the surrender or abandonment of either vessel or freight.

3. This is a rule absolutely unknown to the maritime law.

And while a method of effectuating this limitation of liability, *similar* to that which the rule of the maritime law of Europe requires, is allowed by Section 4285, yet that is purely incidental and different from anything in the maritime law of Europe. Indeed, as a matter of security, the latter seems to afford the injured party better security than the former, wherever anything of the ship and freight remains, as the owner may dispose of them and leave the injured party only his personal responsibility to the amount of the value.

4. Moreover, this statute expressly includes not only acts of the master, *ex delicto*, but *ex contractu*, and includes those which relate to interests which are confided to the owners as common carriers, as well as those which relate to the interests of third parties.

It is certainly very much to be doubted whether any such uniform rule can be found in the maritime law of Europe at the time of the passage of this statute. Under such circumstances, surely this Court will regard itself as quite free to put its own construction upon a statute that is thus distinctive in its character.

Sixth.—The question then is as to the *proper* construction of the terms of Section 4283, which declares the limit of the liability of the owner to be that it "*shall in no case exceed the amount or value of the* "*interest of such owner in such vessel and her*

"*freight then pending;*" that is to say: What is the proper construction of the words "amount or value "of the interest of such owner in such vessel" where *the case is one in which, although the vessel is lost, the owner is able to realize the whole or the greater part of its value through the insurance* which he had upon it at the time the wrong complained of was entered upon.

There are two particulars in respect to which it is necessary to resort to construction from the lack of express words.

1. The first relates to the time at which the "amount or value of the interest of such owner" is to be taken. "The statute does not define at "what time that interest is to be taken" (opinion in Norwich Company *vs.* Wright, 13 Wall., 120).

(*a*) In this regard this Court has already had occasion to a certain extent to declare what the true construction is, and it has decided that so far as *the mere vessel is concerned* it is not the value before the disaster and when in its sound condition, but the value of it as affected by the disaster; and so far as the mere vessel is concerned this value is ascertained at that point of time which determines what there is of the vessel that still remains to the owner—the value that the owner is able to realize from the vessel. And this construction is in accordance with the evident *purpose of the statute to relieve the owner from any further loss for the wrong done beyond his capital in the vessel and the pending freight.*

> See this distinctive purpose forcibly explained in 13 Wallace, 121, where the opinion of this Court was delivered by Mr. Justice Bradley, and the limitation upon the liability of corporators is referred to by way of illustration.

(*b*) So much as to the construction in this regard where there is nothing but the bare vessel to be considered.

(*c*) But now we come to a case where the vessel, when it is sent upon a wrong course by its master and crew, whereby destruction is to be brought upon it and the property of others, is insured to the owner for its full value.

The vessel is moving irresistibly on its course of destruction through the negligence of its master and crew, and the question arises—*may not the value of the interest of the owner in that vessel at that moment of wrong doing and before such destruction occurs be taken as the value so far as to include the insurance on the vessel?*

The value of the vessel at that moment considered as a subject of sale in the market may be assumed to be very little. *But the owner would not part with his interest in it for less than the amount of his insurance upon it.*

He would say of course "I will not sell this vessel even in its critical condition for a song or any inconsiderable sum, and thus deprive myself of my insurance." It is the insurance which fixes the value of his interest in this vessel at the moment when it is about to inflict, by reason of the negligence of the owner's agents, injury upon others and upon itself as well.

When the statute says "the value of the interest," etc., it plainly must mean one of two things, either the value to others, or the value to the owner. It would be no strained construction of the statute to make it read "the value *to him* of the interest, etc." And if it is to be the value to the owner, such value must include the amount of insurance.

(*d*) That such a construction in no wise does violence to the language used, but is entirely reasonable to avoid an effect, which we cannot suppose Congress intended, is shown by the decisions of the English courts in construing language not perhaps so favorable to our view as that we are considering, the language of the English statute being

"No owner," etc., "shall be liable," etc., "further "than the value of his or their ship or vessel and "the freight due and to grow due," etc.

It is of this language that Baron Parke said: "It is the value of the ship and freight *at some* "*time*," and then, "it is the value at the moment "the loss commences" * * * * "It is not to "be reduced by the consideration that the defend- "ant's ship is about to founder, at which time it "is really of no value." 15 M. & W., 397, 398.

A construction of our statute, that goes so far as this, has been rejected by this Court for the reason that it does make the owner liable so far as to involve his other property, his land property as well as his property afloat.

But to take the real value of the vessel to the owner at the same point of time specified in the English decisions so *as to bring in the value of his insurance*, seems to us to be in precise accordance with the spirit and meaning of the statute.

2. And this brings us to the second particular in this question of construction, to wit, the significance of the word "value."

Does it mean anything other than that value which the owner, by reason of his interest in the vessel at the time she does the wrong, can himself realize? It seems to us clearly not. And we earn- estly submit that that is precisely where the line was intended to be drawn by the statute, and that all the interest which the owner had in the vessel at the time of the wrongful act, which resulted in damage and loss, is to be brought into account for the injured parties either directly as in cases of transfer, or indirectly as a measure of liability.

The rule should be the value of the interest of the owner in the vessel when it proceeds to commit the wrong so far as that value can be realized in any way by the owner.

Nor does Sec. 4285 at all militate against apply- ing this construction to Sec. 4283. Sec. 4283 stands

as the leading Section, and declares the limitation; Sec. 4285 specifies one method of effectuating that limitation.

And the words "interest in said vessel" in Sec. 4285 must be held to include the "interest in such vessel" which goes to fix the value according to the true intent and meaning of Sec. 4283, and would therefore include the insurance.

Seventh.—We see no answer that can be given to this course of reasoning short of saying that Congress intended by the statute to adopt a measure of limitation of liability in exact accordance in all particulars with what the maritime laws of modern Europe prescribed at the time of the passage of this Act; and then to claim that there is nothing for this Court to do but to devote itself to the ascertainment of what the preponderance of authority in Europe is upon this particular question.

And such an answer we are confident this Court will never sanction.

There is then no difficulty in the way of giving the Statute the construction we contend for, so far as its terms are concerned.

Eighth.—But certain objections have been raised to this construction based upon the alleged purpose and policy of the Act.

The trouble, however, is that most of these objections rest upon a wholly one-sided view as respects such supposed purpose and policy, and the rest are without any real force or pertinency to the subject.

(*a*) As, for instance, it is said that a policy of insurance is a wholly personal contract with the owner

resting upon the consideration of a premium paid. The force and pertinency of this we do not perceive; for certain it is that at the moment of threatened destruction the value of the owner's interest in the vessel is fixed almost entirely by the insurance he has upon it, and that interest after the destruction of the vessel takes the form of a claim upon the insurer for such value; and the further objection that the policy is "distinct independent subject of prop-"erty" when considered in relation to the point of time mentioned, cannot be regarded as having any force or significance.

(*b*) The adoption of a construction by which the value of the owner's interest is found to include the interest in the vessel which the owner has, *at the moment of wrong doing and danger*, by reason of his insurance upon it, and construing the term "value" as meaning that value which the owner is able to realize from such insurance or otherwise, will avoid or overcome all the objections that have been raised to the taking the insurance into account based upon the nature of the insurance contract, and which *assume* that the "value and amount of "the owner's interest" are to be confined to the mere *market value* of a ship subject to all the risks and injuries to which it is exposed in its course of wrong doing.

(See these objections fully stated in the opinion of Judge Kane, in Watson *v.* Marks, 2 Am. Law Reg., 167.)

(*c*) The learned judge in that case refers to the following statement of Pardessus: "It follows that if "the ship has been insured, the owner should sur-"render his rights against the underwriters," and says he does not sustain it either by argument or authority. He urges that the reasoning of Boulay Paty is unanswerable, and then adds, "and it is borne out "by the established policy of commercial institu-

" tions. It would discourage insurance were we to
" deny to the ship-owner the benefit of the contract
" for which he has paid his premium. It would dis-
" criminate to the disadvantage of small capitalists,
" who must insure with third persons, in favor of
" the *millionaire* whose extended means allow him
" to stand his own underwriter, and who, not re-
" ceiving the amount of loss from third persons,
" would not be called on to pay it over to the ship-
" per or to the disadvantage of the prudent in favor
" of the reckless.

" What matters it to the shipper whether the
" ship was insured by the owner himself or by a
" third person? What right can he claim in the
" one case more than the other? He did not in
" either case contribute towards the premium of in-
" surance; it added nothing to the freight he en-
" gaged to pay; he never stipulated that the ship
" should be insured at all, nor inquired whether it
" was so. He gave credit, when he shipped, to the
" vessel; she became hypothecated to him as she
" stood; the owner's liability was measured by her
" value. What has he to do with the other con-
" tracts of the owner, whether made afterwards or
" before? What right has he to expect that the
" fruits of them shall be superadded to the only
" security for which he bargained?"

For a further like train of reasoning suggesting difficulty and impraticability, see the opinion at page 171.

(*d*) Now we concede that all this is *pertinent* to the discussion. The object is to show that the *effect* of the construction which we contend for would be *impolitic*, *unreasonable*, *unjust* and *impracticable* and therefore to be avoided if possible.

(*e*) It strikes us, however, that the views above quoted and referred to are wholly one-sided and wanting in judicial force and sensibility *as regards the question of redress to the injured party*, who,

indeed, may not be a shipper, but a third party who never heard of the ship before.

In this case we represent a passenger who, with his hard-earned savings, was on board the *Kate Dyer*, returning from California to his friends and home at the East. It was not a large sum—$5,000 California gold—but it was his all. The wrong doing of the agents of the owners of the *Scotland* left him penniless. We, as his advocates, are endeavoring to obtain for him some redress for this wrong. That is our position, and we take an entirely different view of the "policy of commercial institutions" from that taken by the learned judge in his opinion above quoted.

And now, when we apply to this Court for a ruling that shall give redress in some measure, we assume that the Court will only inquire as to the *exact limitation of liability to which the Statute entitles these owners.*

Its only policy is to do exact justice so far as the law allows.

And we submit that in a Statute which changes our *former maritime law* and interposes a limitation where *none before existed*, the exact extent of that limitation, in view of what our former law deemed just, is to be found by going no further in the way of limitation *than is clearly expressed.*

Even that measure of limitation must be oftentimes attended with great hardship; and, in view of the former law, justice to injured parties and well settled general principles have to be set aside, and for what? To subserve a policy of encouraging the investment of capital in ships by providing, as we understand the Statute to intend and this Court to have decided, that ship-owners shall have at risk no other property than that which they so invest. This is the extent of the protection proposed for them *and the extent of the sacrifice demanded of parties injured by the ship-owner or his agents.*

(*f*) In the case of the *Rebecca* (1 Ware, 207), Judge Ware says:

"The rule which holds the principal responsible "for the tortious acts of his agent will in its terms "include the master of a vessel. But it is a rule "founded merely in expediency, and not in natural "justice, except so far as the principal has derived "a benefit from such acts; public policy must "also determine to what cases the rule shall ex- "tend. The general sense of the commercial world "seems to be satisfied with holding the owners of "vessels responsible to the extent of their interest "in the ship, and, by abandoning the ship and "freight to the creditors, they are discharged. "This has for a long period, if I am not mistaken, "been the law of all the maritime nations of Europe "with respect to damages arising from the *wrong* "*and illegal acts of the master*. It, however, has "never been acknowledged in England or in this "country, though it seems that the sense of the "commercial community is in favor of this limita- "tion of the owner's responsibility for *the tortious* "*acts of the master*. And accordingly on the peti- "tion of merchants and ship-owners it has, *in a* "*number of particulars*, been established in Eng- "land by Acts of Parliament. Abbott on Shipping, "Part 3, Ch. 5. We have in this country no act of "the general government on this subject, but a "similar limitation of the responsibility of the "owners has been established by legislative author- "ity in the States of Massachusetts and Maine. "*But there is certainly great difficulty consistently* "*with the present usages of commerce in extending* "*this rule to the contracts of the master*."

(We may say in passing that the very fact that our Statute does include the contracts of the master is another reason why its construction cannot be absolutely controlled by the maritime law of foreign nations.)

That the rule of our common law and of our maritime law as it was before the Statute, which

made the owners liable for the "wrongs and illegal acts of the master," done in the course of his employment, is not founded in natural justice may not be so easy to establish (see Grotius, De Jure, Lib. 2, Cap. 11, §§ 12, 13); it certainly is grounded in well-settled principles of the law wrought out for the purpose of administering justice; and we should not, therefore, lose sight of that side of the question which inquires *what is just to the party injured* in determining the proper construction of the Statute in question, *which covers not only torts but contracts, injuries to third persons and neglect of duty and betrayal of trust on the part of common carriers.*

And when we read views such as those expressed by Judge Kane, we may also do well to read the exposition of principles to be found in the celebrated opinions of other able judges, such indeed as that of Lord Chief Justice Holt in Coggs *vs.* Bernard (2 Ld. Raymond, 917) touching the law of Bailment, principles which, says Mr. Justice Bueler, "We have seen stated, reasoned upon, enlarged and explained, until we are lost in wonder at the strength and stretch of the human understanding."

"The law," says Lord Holt, "charges this person" (the carrier) "thus entrusted to carry goods, "against all events but acts of God and the enemies "of the King. For though the force be never so "great, as if an irresistible multitude of people "should rob him, nevertheless he is chargeable. And "this is a politic establishment, contrived by the "policy of the law for the safety of all persons the "necessity of whose affairs obliges them to trust "these sorts of persons, that they may be safe in "their dealings. For else these carriers might have "an opportunity of undoing all persons that had any "dealings with them, by combining with thieves, "&c., and yet doing it in such a clandestine "manner as would not be possible to be discovered."

From which it appears that there is a principle in

the law which looks well to the care of those who may be exposed to injury.

And hence the propriety of putting the pressure of liability upon those who entrust their business operations to agents, to stimulate them to look well to the *competency and fidelity of the agents* in whose power they put it to injure the interests of others.

(*g*) Should it be suggested or surmised, that our poor client in this case stands in the same category as to his rights—surely not his fortune—as strong corporations, who may be supposed to have insured the *Kate Dyer* and her cargo, and who may be supposed to be entitled to any recovery by the owners by subrogation, and that, these insurers having taken their risk, it will be no great hardship if they have to suffer loss, we have to say :

1*st*. These insurers, if such they are, have been compelled to pay by reason of the wrong doing of the agents of the owners of the *Scotland* and are justly entitled to redress within the limitation which this Statute may impose. In the absence of the Statute they would have been entitled to full redress.

2*d*. Our client the co-libellant Rollins never had any insurance and his only redress for his loss must be such and such only as this Court may award him in this action.

3*d*. *The construction to be given to the Statute must, of course, be given in view of all the classes of persons and all the varieties of damage and injury which come within its purview.*

Only so can its just ends be obtained with due regard to the rights and interests of all who may chance to be affected by it.

We therefore feel sure that this high Court, sitting to administer justice, will, with due considera

tion for the just claims of all parties, give that construction to the Statute which we have above presented.

Ninth.—Thus far we have been contending for what seems to us a just and equitable construction of the Statute considered with close reference to its own terms and our maritime law, as it existed at the time it was passed, and the utterances of this Court where the mere matter of vessel and freight without insurance were under consideration.

And we have especially contended :

(1.) That this Court in those utterances has not fixed and has not intended *to fix a point of time* under the Statute *as a substantive thing* to be made decisive of all questions affected by it.

(2.) That the effect of what the Court has said is not different from what it would have been if it had expressed itself thus : "So far as the mere vessel is concerned, considered apart from any question of insurance upon it, the value to be taken *is the value of the vessel as affected by the disaster and subsequent voyage to port.*

(3.) That the *substance* of the difference between this Court and Baron Parke relates not to the point of time when he says it "is the value at the moment the loss com.ences," but to his declaration that "it" (the value) "is not to be reduced by the consideration that the defendant's vessel is about to founder, at which time it really is of no value."

(4.) And that while Baron Parke declares that the value is not to be so reduced, because "that would be to exempt the defendant altogether," this Court

is not, under the wording of the Statute, to be prevented from holding that the insurance enters into the value to the owner of the ship at the moment the wrong act was entered upon, or say "at the moment the loss commences," because that would be to trespass upon an exact boundary of time prescribed by the terms of the Statute.

(5.) That the precise question which the Court aimed at solving was not "when," but "what;" and that therefore it has decided, and has intended to decide, nothing more than that the value of the vessel uninsured is its value *as exposed to danger* by reason of its wrong doing, *and is to be measured by its condition and value after the disaster, and on its arrival in port;* and that it has not decided nor intended to decide that for no purpose can the vessel be spoken of under the Statute, except as of some *point of time* after the diaster and after the voyage to port; and that *time* has only been referred to by this Court as a convenient way of expressing how the value is to be arrived at in the given case, and which would have been expressed otherwise, had it been seen to be necessary to prevent the misconception which is now put forward by counsel.

Tenth.—Several very persuasive considerations may now be enumerated as constituting a strong preponderance of reason in favor of our view of the proper construction of the Statute on the point in question.

I.—The construction of the Statute, which shall take the value of the interest of the owner of the offending vessel subject not only to the effects of the disaster and the subsequent voyage to port, but also without any reference to the owner's insurance on the vessel which, at the moment the loss commences,

may be its only element of value, and thus shall permit the owner to realize, it may be, the full value of his vessel, while injured parties are left without any redress, strikes the mind at once as unreasonable and unjust, and a rule of limitation that shall so operate, as an unreasonable and unjust rule.

II.—The reason given by Baron Parke in Brown *v.* Wilkinson, 15 M. & W., p. 398, for the construction, which refused any reduction of value by reason of the total loss of the offending vessel, was, because "that would be to exempt the defendants altogether," a result too extreme, he evidently thought, to be contemplated by the Statute. But when we consider the case where the owner of the offending vessel realizes its full value from his insurance, the suggestion that he shall have that construction of the Statute, which entitles him not only to limit his liability to the value of his vessel subject to the effects of the disaster, and the subsequent voyage, but also subject to the right in him to exclude from consideration that value which he is able to realize from his insurance upon the vessel, while the party suffering the injury is left wholly remediless, we repeat strikes the mind at once as *unreasonable and unjust* and any rule that so operates as *an unreasonable and an unjust rule.*

III.—It must be borne in mind that in English and American law this limitation of liability for owners of vessels comes as an exception to what was formerly a universal rule, and such limitation is now one that relieves owners of vessels from the operation of a rule *still universally applicable to all other classes of persons.*

See the rule perspicuously stated in Addison on Torts, vol. 1, sec. 36: "Every servant acting in the "execution of his master's business represents the "master himself and his acts are, in contempla- "tion of law, the acts of his master. This rule ap- "plies not only to domestic servants, who have the

"care of carriages, horses and other things in the "employ of the family, but to other servants whom "the master or owner selects and appoints to do "any work, or superintend any business, although "such servants be not in the immediate employ or "under the superintendence of the master.

"As, for instance, if a man is the owner of a ship, "he himself appoints the master, and he desires "the master to appoint and select the crew; the "crew thus become appointed by the owner, and "are his servants for the management and govern-"ment of the ship, and if any damage happens "through their default, it is the same as if it hap-"pened through the immediate default of the "owner himself. So the same principle prevails if "the owner of a farm has it in his own hands, and "he does not personally interfere in the manage-"ment, but appoints a bailiff, etc., etc.

"So in the case of a mine, if the owner employs a "steward or manager to superintend," etc., etc.

But it is not necessary to resort to quotations to impress the rule upon the mind; it is common knowledge as being a rule of universal sway upon the land, as it formerly was by English and American law upon the sea.

Nor have the courts and distinguished jurists failed to give excellent and convincing reasons for the rule.

In the case of The Philadelphia and Reading Railroad Company *vs.* Derby, 14 How., 486, 487, this Court expressed itself with much earnestness in a case where the injury had occurred by a disobedience of orders on the part of the servant.

"When carriers undertake to convey persons by "the powerful but dangerous agency of steam, "public policy and safety require that they be held "to the greatest possible care and diligence. And "whether the consideration for such transportation "be pecuniary or otherwise, the personal safety of "the passengers should not be left to the sport of "chance or the negligence of careless agents.

"The rule 'respondeat superior,' that the master "shall be civilly liable for the tortious acts of his "servants, is of universal application, whether the "act be one of omission or commission, whether "negligent, fraudulent or deceitful. If it be done "in the course of his employment, the master is "liable; and it makes no difference that the master "did not authorize or even know of the servant's "neglect, or even if he disapproved or forbade it, he "is equally liable, if the act is done in the course of "his servant's employment." (p. 486.)

Again at p. 487:

"Although among the numerous cases on this "subject some may be found (such as the case of "Lamb *vs.* Polk, 9 C. & P., 629) in which the Court "have made some distinctions which are rather "subtile and astute, as to when the servant may "be said to be acting in the employ of his mas- "ter; yet we find no case which asserts the doc- "trine that a master is not liable for the acts of "a servant in his employment, when the particular "act causing the injury was done in disregard of "the general orders or special commands of the "master. *Such a qualification* of the maxim '*re-* "*spondeat superior*' *would in a measure nullify it.* "*A large proportion of the accidents on railroads* "*are caused by the negligence of the servants or* "*agents of the company.* Nothing but the most stringent enforcement of discipline, and the most "exact and perfect obedience to every rule and or- "der emanating from a superior, can insure safety "to life and property. The entrusting such a pow- "erful and dangerous engine as a locomotive to one "who will not submit to control, and render im- "plicit obedience to orders, is itself an act of negli- "gence, the 'causa causans' of the mischief; while "the proximate cause, or the *ipsa negligentia* "which produces it, may truly be said, in most "cases, to be the disobedience of orders by the ser- "vant so intrusted. If such disobedience could be

"set up by a railroad company as a defense when "charged with negligence, *the remedy of the injured* "*party* would, in most cases, be illusive and dis- "cipline would be greatly relaxed. Any relaxation "of the stringent policy and principle of the law "affecting such cases, would be highly detrimental "to the public safety."

And hence Marsden says, "so far as the law limiting their (shipowners') liability, departs from the ordinary rule—respondeat superior—it affords a direct encouragement to reckless navigation." (p. 76.)

IV.—The well established and firmly held principles of public policy as affecting Common Carriers are to be well considered in determining the construction under consideration, and they call with urgent force for the construction which we contend for.

(*a*) If this construction be not the true one, then the owners of vessels who keep their vessels insured (and the practice on the part of owners to do so is now well nigh universal, and will become absolutely so if our contention here shall be held to be futile) will be substantially relieved from all pressure through fear of loss and liability as a motive to be careful in their selection of master and crew.

And in the event of their vessel doing damage, such as was done by the *Scotland* in this case, it will be for the positive and large interest of the owners that the master shall have the requisite cunning and depravity to see to it that the vessel shall never reach port in safety. The matter is most plain and clear to the simplest understanding.

If the offending vessel is insured, say for its full value, and does damage to another vessel, say to the amount of such value, and is itself damaged but little when it arrives in port, then the owners of the offending vessel lose substantially the whole value of the vessel; but if, on the other hand, the offending vessel is lost before reaching port, then the

owners of the injured vessel take nothing, and the owners of the offending vessel take and keep its full value in the shape of the insurance money.

So that in such a case there is not the comparatively small temptation to the master to lose the vessel, which arises from over-insurance, or the desire to make a sale of the vessel, as the phrase is, but the enormous temptation of the desire and chance of saving from loss the whole value of the vessel. And to that degree does it become for the interest of the owners (and is so seen to be by the master) that the vessel should not escape the calamity, or at least the voyage.

We may illustrate the matter thus: say the damage to the injured vessel and its cargo and passengers is $250,000, and the offending vessel is worth that sum, and is insured for its full value. If the offending vessel comes into port without much injury, it is substantially all lost to the owners; if, on the other hand, it is itself brought to destruction, it is all saved to the owners.

Thus the construction of the Statute, which shall save to the owner that value of the vessel which the insurance gives him, not only lifts from him all pressure and motive to care and diligence in the selection of subordinates, but on the other hand offers him an enormous premium for the selection of such as will, in the given emergency, know how to sacrifice all other interests to save the value of the vessel to the owners.

Of course, there can be no answer to the force of the argument involved in such a result, but to say that owners and masters do not require any such pressure to stimulate to the discharge of duty, and that there cannot be any danger that they will be led to its betrayal by any such temptation, and that what this Court and other courts have been saying upon this subject during the whole course of their existence had neither principle nor reason to sustain it.

Such stultification as would be involved in such an answer is, of course, not to be thought of, and can hardly be mentioned with respect to this honorable tribunal. *How can we doubt, then, that masters and owners will learn from the decision of this Court, upon this question, that no such temptation is ever to assail them, so far as it rests with this Court to determine?*

V.—This Court has been in the past most firm in upholding a just policy as affects the responsibilities of common carriers. Where other courts have faltered it has not.

> See notably the case of Railroad Company *v.* Lockwood, 17 Wallace, 357, and the New York cases there referred to and disapproved.

It was in that case that this Court refused its sanction to the doctrine that a common carrier could relieve himself from liability for the negligence of himself or his servants by special contract made for that purpose.

Referring to the effect of the decisions of the New York Court of Appeals holding a different doctrine, this Court say: "In passing, however, it is apposite "to call attention to the testimony of an authorita-"tive witness as to the operation and effect of the "recent decision referred to. 'The fruits of this "'rule,' says Judge Davis, 'are already being "'gathered in increasing accidents, through the "'decreasing care and vigilance on the part of these "'corporations; and they will continue to be reaped "'until a just sense of public policy shall lead to "'legislative restriction upon the power to make "'this kind of contracts.'" 17 N. Y., 368.

And then 17 Wallace, at page 377, we find the policy of the law upon this subject put in language so forcible and instructive as to leave nothing to be desired further.

"But," (says this Court): "it is contended that "though a carrier may not stipulate for his own "negligence, there is no good reason why he should "not be permitted to stipulate for immunity for "the negligence of his servants, over whose actions, "in his absence he can exercise no control. If we "advert for a moment to the fundamental princi- "ples on which the law of common carriers is "founded, it will be seen that this objection is in- "admissible. In regulating the public establish- "ment of common carriers, the great object of the "law was to secure the utmost care and diligence in "the performance of their important duties—an ob- "ject essential to the welfare of every civilized com- "munity. Hence the common law rule which "charged the common carrier as an insurer. Why "charge him as such? Plainly for the purpose of "raising the most stringent motive for the exercise "of carefulness and fidelity in his trust. In regard "to passengers the highest degree of carefulness "and diligence is expressly exacted. In the one "case, the securing of the most exact diligence and "fidelity underlies the law, and is the reason for it; "in the other it is directly and absolutely pre- "scribed by the law. It is obvious, therefore, that "if a carrier stipulates not to be bound to the ex- "ercise of care and diligence, but to be at liberty to "indulge in the contrary, he seeks to put off the "*essential duties* of his employment. And to as- "sert that he may do so seems almost a contradic- "tion in terms."

"Now, to what avail does the law attach these "essential duties to the employment of the common "carier, if they may be waived in respect to his "agents and servants, especially where the carrier "is an artificial being, incapable of acting, except "by agents and servants? It is carefulness and "diligence in performing the service which the law "demands, not an abstract carefulness and diligence "in proprietors and stockholders, who take no "active part in the business. To admit such a dis-

"tinction in the law of common carriers, as the "business is now carried on, would be subversive "of the very object of the law."

And see also Bank of Kentucky *v.* Adams Express Co., 93 U. S., 181.

VI.—It is a familiar rule that statutes are to be construed in reference to the principles of the common law. (See Kent's Com., Vol. 1., p. 464, where this rule is stated as follows):

"Statutes are likewise to be construed in reference "to the principles of common law; *for it is not to "be presumed that the Legislature intended any "innovation upon the common law, further than "the case absolutely required.* This has been the "language of the courts; and when we consider the "constant, vehement and exalted eulogy which "the ancient sages bestowed upon the common law "as the perfection of reason, and the best birth-"right and the noblest inheritance of the subject, "we cannot be surprised at the great sanction given "to this rule of construction. It was observed by "the judges, in the case of Stowell *v.* Touch (Plow-"den, 365) "that it was good for the expositors of "the statute to approach as near as they could to "the reason of the common law; and the resolution "of the barons of the exchequer in Heyden's case (3 "C. 7) was to this effect. For the sure and true in-"terpretation of all statutes, whether penal or "beneficial, four things are to be considered: What "was the common law before the act; what was the "mischief against which the common law did "not provide; what was the remedy the Parliament "had provided to cure the defect; and the true "reason of the remedy." (1 Kent's Com., 464.)

"In the construction of the laws of Congress, the "rules of the common law furnish the true guide."

Rice *vs.* Railroad Co., 1 Black, 374-5.

VII.—The fact that this limitation of liability is an exception to the rule applicable to all other classes

of persons seems to be a strong reason why care should be taken not to extend the limitation beyond the necessary meaning of the terms employed in the Statute, and especially that that construction should, if possible, be avoided which shall make such a limitation as shall seem to be excessive and not within the contemplation of Congress in passing the Act.

VIII.—The intention of the statute is clear. It was that the ship-owner, who sends his ship to sea under the charge of a master and crew, should not be called to pay damages caused by such master and crew *out of his other property;* that he should put at the risk of the carelessness and negligence of the master and crew the property which he has invested in the business, and that he should not put at such risk his other property.

Now, in the first place, the ship-owner will not put at risk of such carelessness of the crew any property at all, if he can keep it insured, and have it held that the insurance is not an element of value in his interest in the vessel, and that therefore he may retain that free from any accountability for the damage done; and in the second place, he is not called upon to repay the damage caused by such carelessness and negligence out of his other property, until the amount of his insurance which he has received or ought to have received is exhausted.

The person who has been damaged by such carelessness may well claim that the ship-owner shall not be allowed to avail himself of the provision of the law until the limit has been reached, which it was the purpose of the statute to establish; and the Court may well say to the ship-owner who is claiming the protection of the statute, that as long as he has not applied to the payment of the damages caused by the carelessness of his master and crew the amount of the insurance which such carelessness has converted the vessel into, the limit has not arrived when he can rightly ask the Court to give him such protection.

A similar construction was applied by this Court in the recent case of Reynolds *v.* Vanderbilt (the *North Star* and the *Ella Warley*). A collision having occurred between two steamers, by which the latter steamer was totally lost, her owners filed a libel against the *North Star* to recover for her loss, which was found to be $40,000, and the owners of the *North Star* filed a libel against the owners of the *Ella Warley*, *in personam*, to recover the damages sustained by the *North Star*, which were about $20,000. The Court having held both vessels in fault, the owners of the *Ella Warley* claimed that their liability in the suit against them was limited by the statute, and that they were entitled to recover the half of their damages in their suit against the *North Star*.

This Court, saying that this proposition was "so startling that the reasoning employed to support it should be scrutinized with some care, before yielding to its force," held that "When the resulting liability of one party to the other has been ascertained, *then, and not before* would seem to be the proper time to apply the rule of limited responsibility."

Now, is it not an equally startling proposition to say that the owner of a vessel may keep the money which he has received, by reason of the loss of his vessel, without paying the damages caused to an innocent vessel by the negligence of his own vessel, and thus throw upon innocent and injured parties the loss occasioned by the negligence of his own agent?

Is it not as startling a proposition to say that the loss occasioned by the act of a wrongdoer shall be borne, not by the wrongdoer, but by the one whom he has wronged? "*Qui parcit nocentibus, innocentibus punit.*"

As this Court properly refused to enter a decree in the case of Vanderbilt *v.* Reynolds at all, but only entered a decree in the case of Reynolds *v.* The *North Star*, for the purpose of reaching the result which equity and fair dealing prescribed, so here,

with that same regard for justice and equity and wise policy, this Court may well put that construction upon the statute which shall, in effect, say to these respondents: "If you have been reimbursed in whole or in part for this loss of the *Scotland*, and have in your pockets the money which represents the vessel, it will be time enough for you to receive the limitation of the statute, when you have applied such moneys to the reparation of the wrong which you have done! And till then the limit of your liability is not reached."

IX.—There is a principle very familiar to Courts of Equity, which, if applied to this case, will plead for the same result. It is the principle that he who asks equity must do equity.

A Court of Admiralty is a Court of Equity.

Such a Court may very well regard it as inequitable that The National Steam Navigation Company shall, by reason of the loss of the *Scotland*, be relieved from the duty of reimbursing to the libellants the damages which they have suffered at its hands, and yet that they shall be allowed to retain the moneys which they have received by reason of that very loss; and therefore, that very express words in the statute would be necessary to establish such a doctrine, and that without them the statute could not have such a construction.

Williams *v.* Fitzhugh, 37 N. Y., 444–452, will illustrate this point.

Courts of Equity had always refused to entertain a suit to remove the cloud of a usurious mortgage, which the statute declared void, unless the borrower would do the equity of returning the sum actually borrowed.

But in 1837 a statute was passed in New York, making provisions for such suits without the necessity of paying, or offering to pay, the principal.

In the above case the mortgage was given to secure some notes which were usurious and others which were not. By the statute the whole mort-

gage was conceded to be void, but nevertheless the Court construed the statute so that it required the borrower to pay the non-usurious notes as a condition of relief. The express words of the statute not absolutely compelling the Court to act in the very case before it, the Court construed the statute so as to enable it to apply the above rule of equity so far as to make the payment of non-usurious notes a condition of a decree declaring the mortgage void.

In other words the Court held the statute to its strictest terms rather than defeat so manifest an equity.

Eleventh.—Having considered the proper construction of this statute from the point of view of English and American law, we may now ask whether there is anything in the rules and discussions of the nations of Continental Europe that should lead this Court to do otherwise than take the value of the vessel subject only to the effects of the disaster and subsequent voyage to port, but not subject to the right of the owner of the vessel to keep for himself that value of the vessel at the moment the loss commences which his insurance on the vessel gives to him.

I.—Now, waiving for the moment the point that this question is primarily a question as to our statute law, we assume that, considered as a question of commercial or maritime law, this Court will regard itself as free to adopt that rule on the point in question, which it shall on the whole deem *most wise and just* in view of all the principles and interests affected, and in view of all the bearings of the matter.

In the case of Railway Company *vs.* Lockwood, 17 Wall., 364, this Court, referring to the decisions

in New York holding that a common carrier could contract for freedom from liability for negligence of itself or servants, said:

"If we only felt bound by those precedents, we "could perhaps find no authority for reversing the "judgment in this case. But in a question of gene- "ral commercial law, the Federal Courts adminis- "tering justice in New York have equal and co- "ordinate jurisdiction with the courts of that State. "And in deciding a case which involves a question "of such importance to the whole country, a ques- "tion in which the Courts of New York have ex- "pressed such diverse views, and have so recently "and with such slight preponderancy of judicial "suffrage come to the conclusion that they have, "we should not feel satisfied without being able to "place our decision upon grounds satisfactory to "ourselves, and resting upon what we consider "sound principles of law."

II. That there are no precedents in foreign states by which this Court will regard itself as bound on this question we presume is pretty certain.

And we suppose that the weight of judicial suffrage on the continent of Europe upon it is not so clearly ascertainable or of that significance, that this Court will feel satisfied without being able to place its decision upon grounds satisfactory to itself, and resting upon what it considers sound principles of law.

III.—This question is clearly one that has been the subject of a good deal of earnest debate on the continent of Europe, and exactly what is to be the final settlement of it is not at all clear, but we may reasonably suppose that the view which this Court shall take will have a very decided effect on the final settlement of the rule.

IV.—One English and two American courts have indicated their view that there was such a maritime rule as compelled the surrender of the insurance

under a system where surrender or abandonment of vessel and freight was the only way of limiting liability—a system thus differing very materially from ours.

These cases are:

Brown *vs.* Wilkinson, 15 M. & W., 396.
Dyer *vs.* The National Steam Navigation Co., 14 Blatch., 487.
Norwich Co. *vs.* Wright, 13 Wall., 117.

The brief to be submitted by other counsel having cases involving this question will show the conflicting views and formative discussions affecting this question as applied to the European system of limitation of liability, and will clearly indicate that the true guide for the settlement of the matter for our country can only be found in a wise regard for the principles and policy of our common law, which this Court has hitherto so carefully upheld.

Twelfth.—It may properly be mentioned that the owner of the *Scotland* is a corporation.

Corporations generally, we believe, own the great steamship lines whose steamships so often bring disaster upon others as well as upon themselves.

Corporators investing their money in ships have, 1st. The limitation of liability accorded to them by their charters, being that limitation which is mentioned in the opinion of this Court where it speaks of the "great carrying trade by land being in the hand of corporate associations whose members are not personally liable for acts of the employés, but risk only the amount of their capital stock in the corporation" (105 U. S. R., p. 30); 2d. The limitation to the value of their ships as reduced by the effects of the disaster and subsequent voyage to port.

And is it not beyond anything contemplated by the statue that there shall be a third limitation of value which shall exclude from consideration the insurance on the vessel?

Thirteenth.—We may be permitted to say again that Sec. 4285 affords no embarrassment to the adoption of the construction we advocate.

The transfer by that section is of the same interest which is mentioned in Sec. 4283, and if, as we contend, the insurance is to be estimated in fixing the value of that interest under Sec. 4283, then the transfer under Sec. 4285 must include the insurance as part of the interest which is to be transferred.

Fourteenth.—Should this Court hold, contrary to our contention, that the liability of the respondents is limited to the value of the articles saved from the wreck of the *Scotland*, then we submit that the Circuit Court erred in not arriving at the amount of the respondent's *present* liability by adding interest upon that value, at least, from the date at which the Court found that that value had been realized by the respondents, to-wit: July 27, 1868.

The first finding of fact is:

"1. That the value of the articles saved from the wreck of the *Scotland* (not including freight or passage money) is the sum of $4,927.85, *which was realized by the respondent on or before July 27th, 1868.*"

See Record, page 16.

As to how this was realized see page 10.

The first finding of law is as follows:

"1. That the proper amount to be paid by the "respondent as depending upon the value of the "articles saved from the wreck of the *Scotland* is "the sum of $4,927.85"

See p. 16, fol. 43.

The first exception of the libellants is as follows:

"1. Libellants except to the first conclusion of "law to the effect that the proper amount to be paid "by respondent as depending upon the value of "the articles saved from the wreck of the Scotland "is only the sum of $4,927.85, and claim and "insist that to such amount interest from the date "of said collision should be added, or if not from "said date, then from July 27th, 1868."

I. The limitation of liability as fixed by the statute, is as follows:

"The liability of the owner of any vessel, &c., "&c. . . . Shall in no case exceed the amount or "value of the interest of such owner in such vessel, "and her freight then pending."

The liability itself is for the damage done, and that arises at the time when it is done.

But by the statute it is not to exceed the amount or value of the interest of the owner in his vessel and her freight then pending.

So the liability thus limited dates from the time when the injury is done, and hence, as in all cases of injury to property, the wrong doer should be required to pay interest upon the amount of that liability thus limited from the date when the liability arose.

To limit the liability, as prescribed by the statute, *as of that date*, is a full compliance with the statute. To require the payment of interest from the same date upon the limited amount does not transgress the limit specified in the statute.

II. Is there any reason arising from the fact that at the date of the injury, the question of liability at all had not been determined either by agreement or by any judicial determination?

Certainly not, this has never been so held.

III. Is there any reason arising from the fact, that at the date of the injury, the amount of the liability, as limited by the statute, had not been determined either by agreement or by any judicial determination?

We submit that there is not.

(*a*) In all actions for damages for property converted or destroyed the rule is to include in the recovery, the interest on the value of the property from the date of conversion or destruction.

Andrews *v.* Durant, 18 N. Y., 496.
Parratt *v.* Knickerbocker Ice Co., 46 N. Y., 361.
Schweerin *v.* McKee, 51 N. Y., 526.

(*b*) Even in an action upon contract to recover for a *quantum meruit* this Court has decided that to allow interest from the commencement of the suit was not error.

Goddard *v.* Foster, 17 Wall., 143.
To the same effect is McCollum *v.* Seward, 62 N. Y., 316.

In the present case the date of the loss or injury as fixed by the decree of the Circuit Court is December 1, 1866.

Record, page 2.

This suit was commenced December 6, 1866.

It is further to be noted that the respondents had the opportunity afforded them under the statute of being active in discharging their liability by transferring the articles saved to a trustee, and thus permitting him to realize upon them by a public sale, and to deposit the proceeds so as to be earning

interest pending the litigation. This they did not choose to do.

Under such circumstances it would seem quite reasonable that, as these wrongdoers elected to retain the articles saved and to realize upon them in their own time and way, interest on the amount of the value of those articles computed from the date of the collision should be added.

This would be to follow the analogy of the rule which in cases of collision allows interest upon the value of the property destroyed from the date of the collision.

See The *Mary Eveline*, 14 Blatchf., 497-8.
Dyer *v.* The National Steam Nav. Co., 14 Blatchf., 499.

Dr. Lushington in the case of The *Amalia* (23 L. J., Code, p. 21,) said it was the practice of the English Admiralty in this class of cases, to add interest and said:

"Lord Stowell gave interest from that date "beyond the value of the ship and freight (the then "Statutory limitation) on the ground that payment "had been delayed. (The *Dundee.*) There is "nothing in the present statute to show that in- "terest is not to be given when the payment of the "limited sum is delayed; and if it were otherwise "there would be a strong temptation to delay the "payment as long as possible."

IV.—That interest should be allowed upon the amount of the value of the articles saved from the date *when that value had been realized by the respondents*, and hence the liability of the respondents, liquidated to that extent, seems to be quite beyond all reasonable controversy.

(*a*) From the moment when the respondents realized that amount their liability to that extent at least was only dependent upon the question whether they were liable at all. And, being found to have been liable, it follows that that

amount should have been at once paid or tendered to the libellants as soon as it was realized, and no such tender having been made the respondents should be subjected to the usual penalty of paying interest upon the amount so realized.

So that we submit that whatever may be said as to any earlier date, we do not see how it is possible that the respondents should be allowed to keep from the libellants the amount of the value which they realized on or before July 27, 1868, on the articles saved, and have the use of the same for a period of some sixteen years and yet be required to pay no interest upon that amount.

Such a holding as that would be to offer to a wrongdoer a very heavy premium to induce delay by litigation.

Let us suppose that the value of what was saved had been $100,000, and that that sum had been realized by the respondents and put out at interest, or put to use in their business. The longer they could protract the litigation, so much the longer they could enjoy the use of this large sum free of liability for interest.

V.—The view taken by English courts on this question is decidedly in our favor.

See African Steamboat Co. *v.* Swanzy, 25 L. J., N. S., ch. 870.
Gen. Iron Screw Collier Co. *v.* Schuemanns, 29 L. J., ch. 877.
Nixon *v.* Roberts, 30 L. J., ch. 844.
Straker *v.* Hartland, 34 L. J., ch. 132.
Smith *v.* Kirby, L. R., 1 A. B. D., 131.
The Sisters, Aspinall's Maritime L. C., Vol. 2 N. S., page 588.
Northumbria L, R., 3 ad. and Ec., 6.

Fifteenth.—Interest should also have been allowed upon the costs ($2,173.10), in the District Court, awarded by the decree of the Circuit Court, entered Aug. 1, 1878.

The decree of the Circuit Court having been affirmed by this Court, except as to the amount of damages, the decree of the Circuit Court, entered upon the mandate of this Court, Sept. 22, 1884, should have decreed not only the payment of those costs but of interest thereon from Aug. 1, 1878.

This follows from the force of the law, which gives interest upon a decree so far as it is not reversed, and of the mandate issued from this Court.

Fifteenth.—The decree appealed from should be reversed so far as it limits the recovery of the libellants to the sum of $4,927\frac{85}{100}$, and the sum of $2,173\frac{10}{100}$, the costs of the libellants in the District Court as taxed, and the said libellants should be declared and decreed to be entitled to the full amount of their damages; or, if this should be denied them, then they should be decreed an amount equal to the value of the articles saved and interest, and costs and interest, as above contended for.

BENEDICT, TAFT & BENEDICT,
Proctors for ROLLINS.

E. N. TAFT,
Advocate.

MAR 11 1985
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

JOSEPH W. DYER et al.,
Appellants,

vs.

THE NATIONAL STEAMSHIP COMPANY.
Appellees.

BRIEF IN REPLY ON BEHALF OF APPELLANT ROLLINS,

AND

ACT OF 1851, APPENDED.

BENEDICT, TAFT & BENEDICT,
Proctors for Rollins.

E. N. TAFT,
Advocate.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St.

U. S. Supreme Court.

JOSEPH W. DYER ET AL.,
Appellants,

AGAINST

THE NATIONAL STEAM NAVIGATION COMPANY,
Appellees.

No. 1149.

REPLY ON BEHALF OF APPELLANT ROLLINS TO BRIEF OF APPELLEES.

First Point.

The claim is made in the first point of respondents' brief that the *measure of the limited liability* of the respondents was litigated on the former hearing of this cause, and partly determined, because "libellants in the Circuit had not been satisfied to rest upon the broad ground that there was no limit of liability whatever, but had given evidence showing remnants and strippings saved from the *Scotland* (Original Record, pp. 170, 171); they made no attempt to prove insurance" (Respondents' Brief, p. 6).

We reply:

I. No limitation of liability was suggested or thought of while this case was in the District Court.

The interlocutory decree was for the recovery by the libellants of "the amount of the damages sustained by them by reason of the collision mentioned in the pleadings herein."

"And * * * that it be referred to Samuel T. Jones, one of the commissioners of this Court, to ascertain the amount of such damages and report," &c. (Original Record, pp. 121–2).

No other subject was referred.

That some evidence got into the case on that reference touching the fate of the *Scotland*, after the collision, is not extraordinary, though not strictly pertinent to the subject of the reference.

The report of the Commissioner is at page 154, *et seq.* of said record, and contains not a word on the subject of the fate of the *Scotland*, or of remnants or savings from her.

The decree of the District Court is at page 158 of said record and contains nothing about the fate of the *Scotland*, or about any savings from her.

II. The Circuit Court also held the respondents liable for the full amount of the libellants' damages, and as to that amount the Court simply affirmed the decree of the District Court in favor of all the libellants except the Republic of Peru, and as to them their damages were arrived at on a different rule and fixed without any further proofs, so that no interlocutory decree was entered and no reference had as to any amount or measure of limited liability, and for the very good reason that the Court held that the respondents were not entitled to any limitation of liability at all.

This Court having reversed the decree of the Circuit on that ground, the question then to be determined in the Circuit Court was the same that it would have been had the Circuit Court in the first instance come to the same conclusion that this Court did on the appeal, in which event the Circuit Court would, at the request of either party, have entered an interlocutory decree and referred the whole question of the amount or measure of the limited liability to a Commissioner to take proof and report.

The usual and familiar course on a trial in Admiralty, is for the Court to receive sufficient proof to show that there is damage to be recovered and then to stop there, enter an interlocutory decree and refer all that

pertains to the amount of the damages to a Commissioner.

It is true that there was some proof taken at Circuit sufficient to show that the allegation in the answer, that the "*Scotland* was sunk and destroyed, and that there is no liability *in personam* against these respondents for said loss of the *Kate Dyer*," was not true, but it is most clear that in putting in such evidence it was never dreamed that in case the Court should determine as this Court has done, that the respondents were entitled to a limitation of their liability, there would be no reference on the question of the amount or measure of that limited liability, and that that question would be controlled by the evidence put in on the issue of whether or not there was any limitation of liability at all.

Just such a reference, and under like circumstances, was provided for in Thommassen vs. Whitwell, 12 Fed. Rep., p. 905.

And it goes without saying that whatever the libellants would have been entitled to from the Circuit Court, had its decision been as supposed, they became entitled to under the mandate from this Court.

And it is quite wide from the fact to say that libellants had the opportunity in the Circuit, according to the well known practice in that Court, to offer all their proofs on the subject of the *measure of the limit of the liability of the respondents.*

On the motion made to amend the mandate, which came too late to be heard, the respondents filed a brief which seems to contain a just statement of the matter. We therefore quote what relates to this subject.

"1. If the present application is to be regarded, literally, as a motion to amend a mandate, it involves no question other than one of the construction of language. The sole inquiry is whether the mandate plainly expresses the will of this Court. That inquiry leads to nothing but a comparison of the mandate with the opinion to which it was intended to give effect.

2. Such comparison, when made, shows that the mandate requires no amendment. The opinion of the Court was that the appellant was entitled to a reversal of the decree appealed from so far as it compelled it to pay the whole amount of damage sustained by the libellants and intervenors, and that with that exception the decree

should be affirmed, and that "the cause," *i. e.*, the whole litigation, so far as anything remained undetermined, should be remanded with instructions to modify the decree and take such further proceedings as might be necessary to carry out the principles laid down in the opinion.

3. The judgment of this Court, as incorporated in the mandate, was that the decree be affirmed, except so far as it condemns the respondent to pay the whole amount of damages sustained by the libellants and intervenors, and as to that portion thereof, that the said decree be, and the same is thereby reversed; and the command of the Court to the inferior Court, as expressed in the mandate is, that "*such further proceedings be had in said cause, in conformity with the opinion and decree of this Court as, according to right and justice and the laws of the United States, ought to be had.*"

4. It is thus apparent that the mandate fully expresses the mind of the Court as indicated by its opinion. It ordered the Court below to administer right, justice and the laws of the United States in the cause. Of course, to the inferior Court, the opinion of this Court, as to every subject discussed in the opinion, would be the highest evidence of right, justice, and the laws of the United States. As the opinion contained nothing concerning the right of the libellants to the benefit of the policies of insurance held by the owners, the mandate, with perfect propriety, omitted all specific allusion to that matter, but, with equal propriety, left it to the inferior Court to determine, subject to the revisory power of this Court, what right, justice, and the laws of the United States would require.

5. There is, therefore, no occasion to amend the mandate."

It was by reason of the intimation of Mr. Justice BRADLEY at the time that motion was presented, that the Court below would doubtless have full power in the premises, and if need be could allow a new article to be added to the libel, that permission to insert such an article came to be asked for, and that it came to be inserted.

It was inserted from greater caution, but I presume the Court will hardly think it was really necessary to entitle the libellants to take any and all proofs needful to determine the measure of the limited liability of the respondents.

Second Point.

It has been held that under the Act the vessel and

freight are to be contemplated with reference to *each distinct voyage.*

"It seems to me," says Judge BLODGETT in the case of the *Alpena*, 8 Fed. Rep., 283, "that each voyage or "trip, each separate journey, which the ship makes "from one port to another, must be treated as a "separate venture, involving its own particular hazards, "losses and earnings; and that when each such voyage "is ended it is for the owner to decide whether the "losses have been such as to make it expedient for him "to invoke the protection given by this Act of Con- "gress. If he does not decide to do this, but sends his "ship upon a new voyage, he thereby concedes his "personal liability for the damages incurred on the "past voyage."

This certainly seems to be a sound view of the matter. Hence the utterances of the statute can best be understood by applying them to the period of the voyage. The true point of observation must, therefore, be from the commencement of the venture on the particular voyage and regard is to be had to "its own particular hazards, losses and earnings," and claimants against the vessel and owner on that voyage must be content with what remains to the owner as the outcome of the venture on that voyage.

Thus the vessel proceeds on the voyage duly insured and with its freight also duly insured. The value of the vessel and freight, and the interest of the owner in them, are enhanced by the insurance.

In every just sense the insurance gives an added value to the vessel and freight from the start, and upon the approach of fatal peril to the ship this insurance will at that moment give to the vessel and freight their chief, perhaps their only value.

In an uninsured vessel about going to destruction the "interest" of the owner is the smallest possible. But in a vessel so situated, if fully insured against loss from the impending danger, the "interest of the owner" and the "value of the interest of the owner" and the value of the vessel to the owner, are substantially

equal to the full value of the same vessel when free from all danger.

And that value being preserved in the form of insurance money, or the right to it, will enable the owner of the offending vessel so far to pay what is due to injured parties; and being thus enabled to pay, he *ought* to pay. And the statute does not afford him any basis for refusal so to do.

Or if he transfer to a trustee, the trust must include the insurance money or the right to collect it.

Third Point.

On the nature of insurance, treated of in Point Second, Subd. II. of Respondent's Brief, some reply may also be proper.

I. For another definition of the contract of insurance, and one that perhaps brings out better the intimate connection of the insurance with the subject insured, we beg leave to refer to one to be found in a note to the last edition of Kent's Commentaries, Vol. 3, page 254, note 1; and taken from an opinion of Mr. Justice GRAY, in Commonwealth vs. Wetherbee, 105 Mass., p. 160. It is as follows:

"A contract of insurance is an agreement by which one party, for a consideration (which is usually paid in money, either in one sum or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." 3 Kent, (13 Ed.) p. 254, note 1.

II. Again touching the relation of insurance to the subject insured, and the assignability of both, we desire to call attention to the following:

(*a*) The *Scotland* was an English vessel and was presumably insured in English companies.

(*b*) By the English law the assignment of subject of insurance, and the policy to an assignee or vendee is

treated as in accordance with well-established custom and practice.

" The assignees, both of the insurable interest of the " assured and of his policy in respect of the same, are " effectually protected by such assignment in respect of " the interest so assigned. This is in virtue of the " language of the instrument itself, and the custom of " merchants now recognized by statute."

1 Arnold on Marine Ins., 5th English Ed., p. 106.

The statute referred to is 31 and 32 Vict., c. 86, and authorizes the assignee to sue in his own name.

And see further, at length, on this subject, same author, pages 111 to 117.

" Unless the policy (as is the case in several States " of the American Union) impose such a condition, " the consent of the underwriters is never necessary to " the validity of an assignment."

1 Arnold on Ins., 5th English Ed., p. 114.

(*c*) Phillips, in his work on Insurance (5th Ed., vol. 1, p. 54, subd. 77) says:

" Where the insured interest is assignable, whether " in a marine, fire, or life insurance, the policy is assign- " able in equity to the assignee to whom the subject " matter or interest thereby insured is assigned, pro- " vided it contains no provision to the contrary " citing many American cases.

" If the subject matter of the policy be assigned be- " fore loss, the policy may also be assigned, so as to " give a right of action to the trustee for the assignee. " But if there be no statute provision (as there is in " Pennsylvania, 1 Binney, 429), the assignee, in a case " of assignment in trust, must sue in the name of the " assignor, who will not be permitted to defeat or " prejudice the right of action of the assignee. The " declaration, in such a suit, may contain the averment " that the plaintiff sues as mere trustee, and that the " whole interest is in others."

3 Kent. Com., p. 261.

And in Spring vs. S. C. Ins. Co., 8 Wheaton, 268, the head-note states the decision of this Court thus:

"Such an assignment" (to wit, one for the benefit of particular creditors) "may include choses in action, as a policy of insurance, and will entitle the assignee to receive from the underwriters the amount insured in case of loss. It is not necessary that the assignment should be accompanied by an actual delivery of the policy."

(*d*) It does not appear that there was any condition against assignment in the policies in this case. And the insurance money has actually been paid.

(*e*) There could be no condition to prevent an assignment of the insurance money, or of a claim for a loss suffered.

(*f*) Where there is a condition against assignment in a policy, it is not broken by an assignment by operation of law.

Fourth Point.

In Point Second, Subd. III., of Respondent's Brief, is the following:

"A strong sense of the difficulty of bringing insurance in as a part of surrender value under the statute has led to the attempt to partly bridge over the gulf by the help of the maritime law."

The question seems to be rather this, whether the effect of the last clause of the original section 4 of the statute operates to prevent the claiming as part of the "surrender value" so much of the value of the vessel when it entered into the collision and attendant danger as survived in the shape of insurance.

The learned counsel himself seems so to understand it from his constant use of the terms "*surrender value*," thus showing his strong reliance upon the clause referred to.

Clearly, had that clause not been in the Act this Court would have applied the other parts of the Act,

all of which are taken almost exactly from pre-existing statutes, in accordance with the construction that they had received at the time the Act of 1851 was passed, and the result would have been that the full value of the vessel just before the loss would have been the limit of liability.

A very excellent account of the sources from which the Act of 1851 was taken is given in Parsons on Shipping and Admiralty, Vol. 2, p. 120 *et seq.*

At p. 121 he says: "The Act of Congress of 1851 "is principally taken from the English Act of 26 "George III., and from the 47th chapter of the Revised "Statutes of Maine of 1840."

"Section 1 is taken nearly word for word from the "second section of 26 Geo. III., c. 86."

Of section 2 he says: "It is based on the third "section of Geo. III., c. 86." *Id.*, p. 123.

"Section 3 is nearly the same as section 8 of the "Maine Revised Statutes of 1840, c. 7. The word "'loss,' which is not in the Maine Statutes, was added "in the Senate. The clause, 'or for any loss, damage, "or injury by collision,' is not in the Statutes of "Maine or Massachusetts, or in those words in any of "the English Statutes." *Id.*, 125.

"Section 4 is nearly, word for word, the same as section nine of the Maine Statute, as far as the last clause."

"The Maine Statute provides for the bringing of a bill in equity for the discovery of the loss or damage, the value of the ship and freight, and for the equal distribution of the sum for which the owners may be liable."

"*The last clause of the fourth section is entirely dif-* "*ferent from that contained in any previous statute*, and "has given rise to questions of great difficulty and em- "barrassment."

Id., 125.

And it will be conceded that this clause is the only part of the Act that can be said to have been drawn from any portion of the maritime law of continental Europe.

All the rest is from English and American sources.

It is strictly correct to say that the claim of our opponents is to make this clause bring the construction of the entire Act down so as *to change the English and American system of statutory limitation of liability in the extremest possible degree.*

Now, what we claim is that *where laws are taken by Congress from different sources, which have been passing, or have passed, through a course of construction, the effort should be to give force to all parts alike, as far as possible, and not to bend to either extreme.*

And as to this last clause of Section 4, it is pertinent to observe:

1st. That if its effect is to be as extreme as is claimed, then the bill was most seriously misunderstood and misrepresented to the Senate by Senator Hamlin, of Maine, as Chairman of the Committee on Commerce, which prepared and introduced it, both at its introduction and afterwards, until it was passed. (See 23 Cong. Globe, 331-2, 715.)

The bill, as first read in Committee of the Whole of the U. S. Senate, will be found in 23 Cong. Globe, p. 331-2, and contained the clause in question, and on its being read, Senator Hamlin said:

"This bill is predicated on what is now the English "law, and it is deemed advisable by the Committee on "Commerce that the American marine should stand at "home and abroad as well as the English marine."

And again, on p. 332: * * * "this "bill conforms to what is the law of England."

And again, on a subsequent day, when the bill was ordered to a third reading, referring specifically to the third section and to the fourth section, which contains the clause in question, he said, "*These two sections are substantially the English law.*"

But note that the English law as it then stood, if applied to this case, would have taken the absolute value of the *Scotland*, insured or not insured, as she was immediately prior to the collision, and subjected her owner to that amount of liability, if necessary, to pay the damages inflicted upon the libellants, and the Cir-

cuit Court, under the mandate of this Court, has found as matter of fact—

"That immediately prior to the time of the collision set forth in the libel the value of the steamship *Scotland*, her tackle, apparel, &c., was at least £100,000 sterling" (see p. 16).

But the potency of the clause in question and which apparently attracted no observation whatever from our law-makers, at the time of its adoption, has been such as to vary from the English law, so far as to put that value (considered apart from insurance and an insignificant value of wreckage), entirely out of consideration in determining the limit of respondent's liability.

This, it must be deeply felt, makes a pretty substantial difference between the English law and ours.

No one who will take the pains to read the history of the enactment of this bill as it appears in the "Congressional Globe," at pages 331–2, 713, *et seq.*, can doubt for a moment that, had it been deemed possible that its construction would lead to such a result as is now contended for by the respondents in this case, not a single vote could have been had in its favor.

But the clause is in the Act, and that too in connection with other provisions which, if the latter had stood alone, would have made the Act such as Senator Hamlin of Maine said it was; and the question is how to arrive at a construction that shall not be extreme in either direction.

1. It is not and never was intended to be the leading feature of the Act. It provides a means to help in carrying out the main purpose of the act, as previously declared.

2. It cannot be resorted to at all without the aid of a Court which is to appoint a trustee and superintend the execution of the trust; and such a Court must in such a case exercise the jurisdiction of a court of equity.

3. And, moreover, supposing the sanction of the Court to be obtained to the establishment of the formal trust and the transfer to the Trustee to be made, that is no abandonment to the injured party, for the Trustee is "*to act as such Trustee for the person or per-*

sons who may prove to be legally entitled thereto." And that may prove to be the party who makes the transfer (Admiralty Rule 56).

4. So that really, had this clause stood alone, it has not so absolute a resemblance to the law of abandonment that has obtained in some of the countries of continental Europe as to press upon the Court any particular aspect or construction of that law as being intended by Congress, and much less can it do so when considered in its relation to the entire Act, and in its invocation of a court of equity jurisdiction for its application.

5. A court of equity, in applying this clause in the exercise of its equitable powers, could not possibly have any difficulty in laying hold of the insurance, and a court of admiralty, aided by the rules of this Court, can exercise such powers so as to accomplish the purposes of the Act.

13 Wall., 123–4.

Such a Court looks at the substance of things.

And when the owner of an offending vessel, who has in his pocket the full value of the vessel and freight in the shape of insurance money, presents himself to such a Court and says, "I have no freight and only a few remnants of my vessel, which is otherwise wholly lost, a court of equity, pointing to the insurance money, would say, "There are your vessel and freight, and there the limit of your liability."

Or, again, such an owner says, "I wish to proceed under this statute by way of trust. I wish to have a trustee appointed, and to account for and transfer to him the subject of the trust."

Will not a court of equity scrutinize the whole subject and scope of the trust, looking for that purpose to the entire voyage and venture—the vessel, the freight, the insurance and the conduct of the owner in respect to the same after the disaster, and make the trust commensurate with the owner's duty and obligation, or refuse to him any limitation of liability?

The owner of the offending vessel has a reasonable

time in which to elect to transfer to a trustee, but when he does elect, a Court of equity will take notice that that election has an operation backwards to the moment of danger, and transfers the risk to the vessel, which arose from that danger, to the injured party. And looking at the entire voyage, it may properly hold that the transfer in trust should in like manner relate back, so as to cover the vessel with its insurance against that risk.

Or treating the insurance money, or the claim to it, as substantially identical with the owner's interest in the vessel, such a transfer will be required as will include the same.

6. In Prov. & N. Y. S. S. Co. vs. Hill Mfg. Co., 109 U. S., 590, this Court, speaking of this Act, said:

"The law was evidently drawn in view of similar "laws adopted and in operation in England and in "some of the States. It laid down a few general "principles and propositions, and left it to the courts "to enforce them and carry them into practical effect."

We cannot but think that those few principles and propositions will be best enforced and carried into effect in this case by requiring the respondent to respond in damages to the extent of the insurance money as well as the wreckage.

7. There is one further observation that ought to be made, and that is, that the power of the Congress of the United States to enact this law is derived from their power to regulate commerce.

Whether the application of it to favor an English corporation as against our own citizens, as is asked for in this case, is within that Constitutional power of Congress has never been expressly passed upon, and is, as it seems to us, well worthy of the consideration of the Court.

BENEDICT, TAFT & BENEDICT,
Proctors for Appellant Rollins.

E. N. TAFT,
Advocate.

APPENDIX.

CHAP. XLIII.—AN ACT to Limit the Liability of Ship Owners and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: Provided, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

SEC. 2. *And be it further enacted*, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or precious stones, shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.

SEC. 3. *And be it further enacted*, That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

SEC. 4. *And be it further enacted*, That if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any Court, for the purpose of

apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any Court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.

SEC. 5. *And be it further enacted*, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

SEC. 6. *And be it further enacted*, That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss, or destruction of goods, wares, merchandise, or other property, put on board any ship or vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or mariners, respectively, nor shall anything herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.

SEC. 7. *And be it further enacted*, That any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.

This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation.

Approved March 3, 1851.

OCT 13 1885
JAMES H. McKENNEY
CLERK

UNITED STATES SUPREME COURT.

JOSEPH H. DYER et al.,
Appellants,

vs.

THE NATIONAL STEAMSHIP COMPANY,
Respondents.

ARGUMENT

Submitted on behalf of Co-libellant and Appellant Rollins, and filed for a further Brief on the Re-argument.

BENEDICT, TAFT & BENEDICT,
Proctors for Rollins.

E. N. TAFT,
Advocate.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

U. S. Supreme Court.

JOSEPH H. DYER ET AL,
Appellants,

AGAINST

THE NATIONAL STEAMSHIP COMPANY,
Respondents.

Argument of E. N. Taft submitted on behalf of Co-libellant and Appellant Rollins, and filed for a further Brief on the reargument.

In this case in which I appear for the co-libellant Rollins, your Honors will remember that the British steamship, *Scotland*, of the National Line, belonging to the respondents, through its own exclusive fault ran down and sank the American ship, *Kate Dyer*, just as she was approaching the termination of her voyage from San Francisco to her home port of New York.

It was off Fire Island light, and on the night of December 1st, 1866, that this frightful disaster occurred, by which the *Kate Dyer* and her valuable cargo were sunk, and fourteen persons out of a ship's company of twenty-seven were drowned. My client was among those who were saved. He escaped, but with loss of all he had on board.

The damage thus caused to the libellants by the *Scotland*, as ascertained by the decree in the Circuit Court, and which in that respect has been affirmed by this Court, amounted to $255,047.70, of which $9,724 were damages of Mr. Rollins, and against which loss he had no insurance. The *Scotland*, immediately before she did this wrong, is found to have been worth at least £100,000.

The effect of this collision upon her was such that she put about and started to return to the port of New York. She proceeded from off Fire Island light, where the collision occurred, to the west side of the channel, south of Sandy Hook, and within from two to two and one-half miles from the Jersey shore, where she stranded on the same night, Saturday, December 1st, 1866. On Sunday morning, December 2, between 11 and 12 o'clock as she lay there, Merritt, the Superintendent of the Coast Wrecking Co. went on board and offered to float and take her into port for $100; and he testified that in his opinion he could have performed this service. (Record p. 170). But the captain waited for the agent of the line in New York to give directions, although warned by Mr. Merritt of the possible difficulty of finding the agent on Sunday and of the danger to be apprehended from a probable change of the weather. The consequence was, that the agent did not send for Merritt to try and save the steamer until the next day, and by the time Merritt was able then to get ready to go to work on her, in the afternoon of that day, a gale arose and stove her to pieces, and she ceased to be a ship forever. The wreckage that was saved from her is found to have been worth only $4,927.85.

The finding of fact at Circuit was this:

"The steamer was, by reason of said collision and in consequence thereof, so injured that, although at once put about, she could only reach the "Outer Middle," so called, on the west side of the channel south of

Sandy Hook, where she sank and became a total loss, except that a large amount of anchors, chains, rigging and cabin furniture of the value of several thousand dollars, was saved from her and delivered to the agent of the respondents. She earned no freight, the voyage being broken up."

Record printed, p. 206.

Had this suit been brought in England, and had the law there been the same as it was at the time our Act limiting the liability of ship owners was passed in 1851, the respondents would have been entitled to no limitation of their liability, except the £100,000, the value of the *Scotland* before the collision. And under the law of England as it stood at the time the collision occurred, the limit of their liability in the English Courts would not have been less than about $200,000, being £8 per ton on a tonnage of about 5,000 tons.

Printed Record, p. 170.

But in our American Courts they are enabled to limit their liability for damages to $4,927.85 (leaving interest out of the account), unless the fact, that the loss of the *Scotland* has been replaced to the respondents in the shape of insurance money to the extent of about $300,000, shall have the effect to enlarge such limit of liability.

And the specific question now to be determined is whether, under our statute limiting the liability of the owners of an offending vessel to the value or amount of the owner's interest therein and freight then pending, our courts in fixing the limit of liability in a case where the offending vessel and freight are themselves lost on the same voyage, can include that which the owner is entitled to recover for such loss of vessel and freight and which when recovered will so far replace that which he has lost.

First. This question may be illustrated by a variety of cases liable to arise; some of which have arisen and are now to be considered by the Court on this very argument.

Thus in the case of Thomassen vs. Whitwell, now here on argument, the offending vessel was uninjured by the collision and proceeded on her voyage, but before reaching port was stranded and lost through the fault of her master and crew, and for this loss the owners collected insurance.

In that case Mr. Justice BLATCHFORD said:

"The risk of the loss of the offending vessel is thrown, for the benefit of commerce, on the owner of the property damaged by her."

BLATCHFORD, J., Thomassen vs. Whitwell, 21 Blatch., p. 62.

But the question arises, if the risk is so thrown by operation of law, upon the owner of the property damaged, why, in case of loss through such risk, should not the right of recovery for the loss go to the party to whom the risk is so transferred?

Let us suppose that the offending vessel comes out of the collision, by which she has destroyed a vessel and cargo, uninjured; but afterwards, on the same voyage she is sunk by some wrongful act of a third party, which gives the owners of the offending vessel a right of recovery for her full value against such third party. Can the owners of the offending vessel retain such recovery wholly to themselves, and leave the owners of the vessel and cargo destroyed by their vessel without any redress?

Or suppose such offending vessel to be subsequently lost on the same voyage by voluntary stranding, whereby her cargo is saved from peril, and so as to give to the owners of the vessel and her freight a claim in general average upon the cargo, can such claim be wholly

retained by the owners, and the owners of the destroyed vessel and cargo be left wholly remediless?

In the case of The Columbian Ins. Co. vs. Ashby, 13 Peters, 331, this Court decided that where a ship was voluntarily stranded to save the crew and cargo from impending peril, and the ship became a total loss but the cargo was saved, a clear case of general average existed, in which the insurers of the cargo were held liable to contribute to the loss of the ship and freight.

Could the owners of a vessel so lost obtain, by reason of such loss, an entire exemption from liability to the owners of another vessel and cargo which had been previously run down and destroyed by the sole fault of the vessel so afterwards voluntarily stranded and lost on the same voyage?

Or suppose any other case where the loss of the offending vessel is attended with a right of action in the owners for the whole or part of her value, how is their limit of liability to be affected by the existence of such a right? Is such a right an interest that must either be transferred to the trustee or valued in limiting their liability?

Again, let us suppose the subsequent loss on the same voyage of the offending vessel to be caused by the fault of a third vessel, under such circumstances that the owners of the offending vessel so lost, can recover her full value of the owners of such third vessel, and futher more that the offending vessel is fully insured against such loss. Then how are the rights and claims of the parties to be adjusted? Suppose the owners of the vessel causing the loss of such offending vessel pay to the owners of the latter its full value. Must not such value so paid be taken into account in fixing the limitation of liability?

But again, supposing the insurance on the offending vessel is first paid, and the insurance company, being subrogated to her claims against such third vessel, collects from her or her owners the value of the offending

vessel. In that case will not the insurance money so received by the owners of the offending vessel be taken into account in like manner, in fixing the limit of their liability?

Will it make any difference whether, on the one hand, the owners of the offending vessel so lost collect the value from the owners of the third vessel, or on the other, receive such value from the insurance company and leave the insurance company to collect the same value from the third vessel?

I am confident that this Court will arrive at one uniform rule in all these cases, and hold that, *wherever the offending vessel and freight are lost under such circumstances, as that the owners have a right of action for the loss, whereby that loss can be wholly or partly replaced to them*, there that right and its proceeds are to be taken into the account in fixing the limit of liability of such owners.

Second. The question then occurs, by what process of legal reasoning in such cases is the conclusion to be reached, that that, which replaces to the owners of the offending vessel the loss of it or its freight, is to be taken into account in fixing the limit of liability.

1st. The statute does not in *specific terms* mention any such case. The same objection so tersely expressed by Mr. Justice BLATCHFORD in Thomassen vs. Whitwell, 21 Blatch., p. 65, could be equally well urged in all these cases.

Mr. Justice BLATCHFORD there says: "The interest in "the vessel which is the measure of the liability under "section 4283, and a transfer of which, if made under "section 4285, operates to discharge the claim for loss "or damage does not extend to what is not an interest "in the vessel." "It was easy," says his Honor, "for "the statute to have provided for liability for and

" transfer of claims for insurance. It fails to do so, " whether the maritime law did so or not."

2d. Now this is strictly true so far as any distinct specification of any of the cases mentioned are concerned. But is not the answer to this objection suggested by what this Court said in Prov. & N. Y. S. S. Co. vs. Hill Mfg. Co. 109 U. S., 590?

" The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down a few general principles and propositions, and left it to the Courts to enforce them and carry them into practical effect." That is to say, it thus indicated briefly a certain *policy of protection* to ship owners, who would otherwise be absolutely liable for injury done by their master and crew, and left the Court to carry it into practical effect.

No attempt was made in the statute to go into all possible details, or to deal with equities that might arise; but these were left to be dealt with by the Court in such a way as to effectuate the general purpose and intent of the law, according to the rules of reasonable and equitable construction of statutes.

The present English statutes *do* deal with some particulars as to which our statute is silent, but as to which this Court cannot be silent. Thus, by the English statutes it is provided that " The owner of every sea-going vessel, or share therein, is liable in respect of every such loss of life, personal injury, loss of or damage to goods arising on *distinct occasions* to the same extent as if no other loss, injury or damage had arisen."

MacLachlan's Law of Merchant Shipping, 3d Ed., p. 123, citing 17 and 18 Vict., c. 104, Section 506.
The Rajah, L. R., 3 Ad., 539.

How such distinct occasions are to be dealt with under our statute, the statute itself does not declare in any

distinct terms, but this Court *must*, nevertheless, deal with them whenever any case presenting them shall come up. The decision in the case of *The Alpena* in the 8th Fed. Reporter, p. 283, presents one way of dealing with them.

"It seems to me" says Judge BLODGETT in that case, "that each voyage or trip, each separate journey which the ship makes from one port to another, must be treated as a separate venture, involving its own particular hazards, losses and earnings, and that when each such voyage is ended it is for the owner to decide whether the losses have been such as to make it expedient for him to invoke the protection given by this act of Congress. If he does not do this, but sends his ship upon a new voyage, he thereby concedes his personal liability for the damages incurred on the past voyage."

But the correctness of the conclusion arrived at in that case seems to be questioned by a recent text-writer.

Henry's Admiralty Jurisdiction, &c., p. 305.

And the true construction or rule remains yet to be declared by this Court.

3d. In Dwarris on Statutes I find this: "In law all cases cannot be foreseen or expressed; the object of interpreting law by what is called equity is to supply, as far as possible, this deficiency, by a recurrence to natural principles of justice." Page 239.

And again, "If the law has determined a matter with all its circumstances equity cannot intermeddle." Fonb. Eq., Ch. 1, Section 3.

Potter's Dwarris on Statutes, &c.

But here are instances of particular circumstances which the statute has not specified, but which are necessarily involved in its proper application and intent. They are instances where the loss to the owners of the

offending vessel and her freight is not real but purely formal.

Literally, if you please, they may be said to be lost; but really they are *not*, so far as value is concerned, and *value* is the substance which the statute deals with. The form in which the value appears is of no importance. If the owner of the offending vessel has its value still, though his vessel is lost, then according to the policy of the statute the measure of protection which he is to receive, is that which remains to him after this value is exhausted. That is the situation looking at the matter in its substance.

But the true rule of construction requires that this matter of substance shall be held to. *Haeret in literis, haeret in cortice.*

Blackstone illustrated this view by the case of the Venetian law, which denounced death to any one who should shed a person's blood in the street. A physician bled a man who had been taken ill on the street. The act of the physician came within the letter of the law, but the substance which the statute aimed at was wholly wanting, and of course sound construction held that this act of bleeding was not within the meaning and intent of the statute.

Third. There are two ways in which the value which is replaced to the owner of the offending vessel and freight on their being lost may be made available to the injured parties.

1st. By holding that the value so replaced is (within the meaning and intent of the statute) the value or a part of the value of the owner's interest in the offending vessel and freight.

2d. By the equitable doctrine of subrogation or substitution, whereby the risk of the offending vessel and freight having been thrown upon the injured par-

ties, the latter become subrogated to all claims for restitution where such risk eventuates in the loss of the offending vessel and her freight.

(*a*) Now, as to the first of these ways, I submit, first, that it will be all wrong to consider the question to be merely this, to wit: Whether or not the right of the owners of the offending vessel to recover for its loss is an interest in the mere wreckage, if any, that may remain of her at the close of the voyage.

The statute is to be considered as speaking of the vessel in relation to some voyage, and the vessel is referred to generally in connection with that voyage; so that whatever interest the owner may have had in the vessel on such voyage and at the time of its doing the injury that interest, so far as it remains to the owner at the close of the voyage, must be valued or transferred, according to whichever mode of proceeding for limiting liability is resorted to.

(*b*) And secondly, as to the force of the word "interest" it is quite clear to me that it must be taken in its broadest meaning, and as embracing not only the title of the owner to, but any contracts of insurance he may have upon the vessel.

It is said that this contract of insurance does not inhere in the vessel. No more does a bill of sale.

It is said that a contract of insurance rests upon a consideration paid, or agreed to be paid, called a premium.

So does a bill of sale rest upon a consideration paid, or held to have been paid; and as to a contract of insurance not attaching to the vessel, it is certain that the insurance is of no avail to the insured without the vessel.

It is also said that the policy is not transferable with the ship. That depends upon whether it is so stated in the policy, and, if it is, then upon the consent of the insurer. But, however it may be as to the policy before loss, the right of recovery after loss,

which is all that is involved in this discussion, is transferable in any event.

As to the claim that the word "respectively," as used in the Act of 1851, section 3, limits the meaning of the word "interest" to share, it has, as it seems to me, no such effect, and its omission from section 4283 of the Revised Statutes shows that it was not intended to have any such effect.

(*c*) Again the word "*value,*" as used in the statute, is amply broad enough to embrace the view of the statute which I contend for.

"The true rule," I say in my brief, heretofore submitted, "*should be the value of the interest of the owner in the vessel when it proceeds to commit the wrong, so far as that value can be realized in any way by the owner.*"

At the moment of imminent and fatal peril to the vessel, its chief value to the owner is that which the insurance gives it. Its value to him remains the same notwithstanding the peril, and after loss that value assumes the form of a claim for the insurance money.

(*d*) A brief reference to the last clause of section 4 of the Act of 1851 will here be proper. It was this clause that prevented this Court from following the decisions of the English and American Courts in construing section 3, and holding that the value of the offending vessel was its "value" at the moment the loss commences, and "is not to be reduced by the consideration that" it "was about to founder."

"The act of Congress, 1851," says Parsons in his work on Shipping and Admiralty, volume 2, page 125, "is principally taken from the English Act of 26 George 3d, and from the 47 Chapt. of the Rev. Stat. of Maine."

* * *

"Section 4," he says, "is nearly word for word the same as section 9 of the Maine Statute, as far as the last clause."

"The Maine statute provides for the bringing of a bill in equity for the discovery of the loss or damage,

the value of the ship and freight and for the equal distribution of the sum for which the owners may be liable.

"The last clause of the fourth section is entirely different from any previous statute, and has given rise to questions of great difficulty and embarassment."

Senator Hamlin, of Maine, was chairman of the Committee on Commerce and introduced and advocated the passage of the bill, and speaking of sections 3 and 4, as they are in the act, he said: "*These two sections are substantially the English law.*"

Now, it seems to me, that the effort should be to harmonize the last clause of section 4 with the balance of the Act drawn from English and American statutes, under which it was held, that the value of the vessel was to be taken as it was before the collision, on some not extreme ground; and therefore I say that:

"Where laws are taken by Congress from different statutes and rules, which have received a particular judicial construction, the effort should be to give force as far as possible to all parts alike."

Our opponents, however, seek to make the clause referred to compel a construction of the entire Act, so as to change the English and American system of statutory limitation in the extremest possible degree.

The clause is in the Act in connection with other provisions, which, if the latter had stood alone, would have made the Act such as Senator Hamlin said it was; and the effort, it seems to me, should be to arrive at a construction of the whole, that shall not be extreme in any direction.

It is not, and never was, intended to be the leading feature of the Act. It provides a means to help in carrying out the main purpose of the Act, as previously declared.

It cannot be resorted to at all without the aid of a Court which is to appoint a trustee and superintend the execution of the trust; and such a Court must in

such a case exercise the jurisdiction of a Court of Equity.

And, moreover, supposing the sanction of the Court to be obtained to the establishment of the formal trust and the transfer to the trustee to be made, that is no abandonment to the injured party, for the trustee is "to act as such trustee for the person or persons who may prove to be legally entitled thereto." And that may prove to be the party who makes the transfer (Admiralty Rule, 56).

So that, had this clause stood alone, it has not so absolute a resemblance to the law of abandonment that has obtained in some of the countries of continental Europe as to press upon the Court any particular aspect or construction of that law as being intended by Congress; and much less can it do so when considered in its relation to the entire Act, and in its invocation of a Court of Equity jurisdiction for its application.

A Court of Equity, in applying this clause in the exercise of its equitable powers, could not possibly have any difficulty in laying hold of the insurance; and a Court of Admiralty, aided by the rules of this Court, can exercise such powers so as to accomplish the purposes of the Act.

13 Wall., 123–4.

Such a Court looks at the substance of things.

And when the owner of an offending vessel, who has in his pocket the full value of the vessel and freight in the shape of insurance money, presents himself to such a Court and says, "I have no freight and only a few remnants of my vessel, which is otherwise wholly lost," a Court of Equity, pointing to the insurance money, would say, "There are your vessel and freight, and there the limit of your liability."

Or, again, such an owner says, "I wish to proceed under this statute by way of trust. I wish to have a

trustee appointed, and to account for and transfer to him the subject of the trust."

Will not a Court of Equity scrutinize the whole subject and scope of the trust, looking for that purpose to the entire voyage and venture—the vessel, the freight, the insurance and the conduct of the owner in respect to the same after the disaster, and make the trust commensurate with the owner's duty and obligation, or refuse to him any limitation of liability?

The owner of the offending vessel has a reasonable time in which to elect to transfer to a trustee, but when he does elect, a Court of Equity will take notice that that election has an operation backwards to the moment of danger, and transfers the risk to the vessel, which arose from that danger, to the injured party. And looking at the entire voyage, it may properly hold that the transfer in trust should in like manner relate back, so as to cover the vessel with its insurance against that risk.

Or treating the insurance money, or the claim to it, as substantially identical with the owner's interest in the vessel, such a transfer will be required as will include the same.

I conclude, then, that the statute is entirely susceptible of the construction which we contend for.

Fourth. The reasons for the adoption of this construction are most cogent.

1. The respondents are here seeking an exemption by virtue of this statute from the rigor of the common law. This exemption is what is defined as a privilege. "Privilege is defined to be a private or particular law whereby a private person or corporation is exempted from the rigor of the common law." Jacob's Law Dict. Art. Privilege. And quoted by Dr. Lieber, *ibid.*

"Privileges or favors are to be construed so as to be least injurious to the non-privileged or unfavored."

Lieber's Hermeneutics, 3 Ed., p. 136.

"Whenever the text to be interpreted bestows privileges upon some one or more persons (to the exclusion, therefore, of others), ambiguous parts are always to be construed in favor of the non-privileged, *provided the object of the privilege be not thereby defeated.* Common sense dictates this limitation of the constitution as required by the commonest principles of fairness." *Id.*, p. 120.

"Privileges and exceptions must be construed, in doubtful cases, so as to be least injurious to the third person."

Prussian Code Introduction, p. 54, quoted from Lieber's Legal Hermeneutics, p. 120.

Now, I ask, if in the case of the loss of the offending vessel and freight, the owner is so situated that he can recover their value, does not common fairness in the application of the statute to such a case require that this value shall be surrendered? And is it not a hard and technical construction which, taking a baldly literal view, says, "it is not so nominated in the bond, therefore let the owner of the offending vessel keep an advantage which was never intended by the lawmakers?" And does not such a construction strike one as not a *fair use of the statute?*

2. The fact that this limitation of liability is an exception to the rule applicable to all other classes of persons, is a reason why care should be taken not to extend the limitation beyond the necessary meaning of the terms employed in the statute, and why that construction should be avoided which shall make such a limitation as shall seem to be excessive and not within the contemplation of Congress in passing the Act.

3. The reason given by Baron Parke in Brown vs.

Wilkinson, 15 M. & W., p. 398, for the construction, which refused any reduction of value by reason of the total loss of the offending vessel, was, because "that would be to exempt the defendants altogether," a result too extreme, he evidently thought, to be contemplated by the statute. But when we consider the case where the owner of the offending vessel realizes its full value from his insurance, the suggestion that he shall have that construction of the statute, which entitles him not only to limit his liability to the value of his vessel subject to the effects of the disaster, and the subsequent voyage, but also subject to the right in him to exclude from consideration that value which he is able to realize from his insurance upon the vessel, while the party suffering from the injury is left wholly remediless,—this suggestion we repeat, strikes the mind at once as unreasonable and unjust, and any rule that so operates as an unreasonable and an unjust rule.

4. The well-established and firmly held principles of public policy, as affecting common carriers, call with urgent force for the construction which we contend for.

If this construction be not the true one then the owners of vessels who keep their vessels insured (and the practice on the part of owners to do so is now well nigh universal, and will become absolutely so if our contention here shall be held to be futile) will be absolutely relieved from all pressure through fear of loss and liability as a motive to be careful in their selection of master and crew.

And in the event of their vessel doing damage, such as was done by the *Scotland* in this case, it will be for the positive and large interest of the owners that the master shall have the requisite cunning and depravity to see to it that the vessel shall never reach port in safety. The matter is most plain and clear to the simplest understanding.

If the offending vessel is insured, say for its full value, and does damage to another vessel, say to the

amount of such value, and is itself damaged but little when it arrives in port, then the owners of the offending vessel lose substantially the whole value of the vessel; but if, on the other hand, the offending vessel is lost before reaching port, then the owners of the injured vessel take nothing, and the owners of the offending vessel take and keep its full value in the shape of the insurance money.

So that in such a case there is not the comparatively small temptation to the master to lose the vessel, which arises from over-insurance or the desire to make a sale of the vessel, as the phrase is, but the enormous temptation of the desire and chance of saving from loss the whole value of the vessel. And to that degree will it become for the interest of the owners (and will be so seen to be by the master) that the vessel should not escape the calamity, or at least the voyage.

We may illustrate the matter thus: Say the damage to the injured vessel and its cargo and passengers is $250,000, and the offending vessel is worth that sum, and is insured for its full value. If the offending vessel comes into port without much injury, it is substantially all lost to the owners; if, on the other hand, it is itself brought to destruction, it is all saved to the owners.

Thus the construction of the statute, which shall save to the owner that value of the vessel which the insurance gives him, not only lifts from him all pressure and motive to care and diligence in the selection of subordinates, but, on the other hand, offers him an enormous premium for the selection of such as will, in the given emergency, know how to sacrifice all other interests to save the value of the vessel to the owners.

Of course there can be no answer to the force of the argument involved in such a result, but to say that owners and masters do not require any such pressure to stimulate to the discharge of duty, and that there cannot be any danger that they will be led to its be-

trayal by any such temptation, and that what this Court and other Courts have been saying upon this subject had neither principle nor reason to sustain it.

Such stultification as would be involved in such an answer is, of course, not to be thought of, and can hardly be mentioned with respect to this honorable tribunal. How can it be doubted, then, that masters and owners will learn from the decision in this case that no such temptation is ever to assail them, so far as the responsibility rests with this Court, which has been in the past most firm in upholding a just policy as affects the responsibilities of common carriers.

See notably the case of Railroad Company vs. Lockwood, 17 Wallace, 357, and the New York cases there referred to and disapproved.

5. Let me dwell a moment on the principle here involved.

"A master is liable to be sued for the injuries occasioned by the neglect or unskillfulness of his servant in the course of his employment."

Thus, "A master is liable for the servant's negligent driving of a carriage or navigating a ship."

Sharswood's Blackstone, Vol. 1, p. (431) note 19.

"The reason of this," says Blackstone, "is still uni-
" form and the same: *that the wrong done by the servant*
" *is looked upon in law as the wrong of the master him-*
" *self.*"

Vol. 1, p. (432).

That is to say, the master is causing the business or operations to be carried on, in the course of which injury happens to a third party through the negligence of the master's servant; and the law deems it a salutary rule that the principal in the business should be

responsible for the negligence and want of skill attending the course of such business or operations.

It is his business and operations, be they great or small; and the law ought, as an incident to such business and operations, to lay the responsibility for the manner in which they are performed upon him *as the only person who is likely to be able to afford third persons suitable redress* in case of injury wrongfully caused in connection with the same.

Also consider what would be the result of the absolute and universal abrogation of the salutary rule of the common law which has for ages *made it an incident of the business and operations of* proprietors, that they shall be held liable for injuries caused to third persons for any negligence attending the course of such business or operations on the part of servants and employees.

The greater the scope of the business and operations, the greater the damage liable to be done to others. And in such cases of damage, if the capitalist, who takes the benefit of carrying on the business, is not to be held responsible, where is redress to be sought?

Not from the negligent servant, for he is not likely to have means adequate to such a responsibility.

And hence it is that the law has justly and wisely placed the liability where it can be made available to injured parties, and made that liability an incident of the business and operations.

Now, Congress, in passing the Act of 1851, intended to give the owners of ships a certain amount of protection from the operation of that rule of the common law.

Congress also intended that the operation of the rule of the common law upon the owners of ships should continue to afford a certain amount of redress to injured third parties.

So that the question to be decided in our case must be considered in this form, namely, what is the meas-

ure of redress still left for the injured parties under the operation of the rule and of the statute?

Can it be less than that which we contend for?

Must they not have that construction of the statute "which shall be least injurious to them, *the object of* "*the privilege*" not being "*thereby defeated*"?

See Lieber as above quoted.

6. It is a familiar rule that statutes are to be construed in reference to the principles of the common law (see Kent's Com., vol. 1, p. 464, where this rule is stated as follows):

"Statutes are likewise to be construed in reference "to the principles of common law; for it is not to be "presumed that the Legislature intended any innova- "tion upon the common law, further than the case ab- "solutely required. This has been the language of "the Courts in every age; and when we consider the "constant, vehement and exalted eulogy which the "ancient sages bestowed upon the common law as the "perfection of reason, and the best birthright and the "noblest inheritance of the subject, we cannot be sur- "prised at the great sanction given to this rule of con- "struction. It was observed by the Judges, in the "case of Stowell vs. Touch, (Plowden, 365), that it was "good for the expositors of the statute to approach as "near as they could to the reason of the common law; "and the resolution of the barons of the exchequer in "Heyden's case (3 C. 7) was to this effect. For the "sure and true interpretation of all the statutes, "whether penal or beneficial, four things are to be con- "sidered: What was the common law before the Act; "what was the mischief against which the common law "did not provide; what was the remedy the Parlia- "ment had provided to cure the defect; and the true reason of the remedy" (1 Kent's Com., 464).

"In the construction of the laws of Congress, the "rules of the common law furnish the true guide."

Rice vs. Railroad Co., 1 Black, 374–5.

7. It seems that upon the continent of Europe, under a system of abandonment of the vessel, in limitation of liability, there has been earnest discussion and a division of sentiment as to whether or not insurance should also be surrendered, and the rules and decisions in different countries, and the decisions of the courts in the same country, have divided upon it. And so have eminent jurists.

I assume that this Court was not unaware of this divergence of views and decisions there, when it called attention to this matter of insurance early, in the City of Norwich case, in the 13th of Wallace, 117, and quoted with apparent approval the position of Pardessus upon that subject in favor of bringing in "insurance, &c."

It seems to have been supposed that this citation of Pardessus on the part of the Court was without a knowledge of the diverse views and arguments that existed, but I infer, on the contrary, that it was from a preference for the view entertained and advocated by that eminent and learned jurist.

The above is the only reference that this Court has ever made to this subject, and the attempt to construe the utterances of this Court in other cases, when the vessel (without any insurance upon it so far as appeared) was alone involved, into a decision of this question adversely to us, seems to me to be quite futile.

This Court has, indeed, decided that under the Act of 1851, by reason of the last clause of section 4, relating to transfer, the vessel, as such, is to be considered as affected by the disaster and subsequent voyage to port, because the vessel could only be transferred in that condition.

That decision was deemed necessary in order to harmonize the two provisions of the statute relating on the one hand, to valuation, and on the other, to transfer.

No such necessity exists where the question relates to that which replaces the loss of the offending vessel, that may be either valued or transferred. This is true of a right to recover insurance money for a loss that has occurred.

This Court has not held that in applying the statute it may not be considered as speaking with reference to the entire voyage and as requiring the statute to be construed in the view of that period, rather than of any specific point in the voyage.

And in saying that the value of the offending vessel is to be taken after the disaster, it has merely adopted a convenient mode of saying that it is to be taken as affected by the disaster, &c.

So that the words "the value of the interest of the owner or owners, &c.," may be considered in their application to an entire voyage in order to ascertain their meaning. This being so, the value of the interest of the owner may be considered as enhanced to the owner by the fact of insurance, in accordance with the view expressed by Emerigon (see below).

9. There are one or two other objections that are urged against our construction, upon which I desire to say a few words.

(*a*) It seems to be supposed by some that Marine insurance has some sort of independent existence that protects it from being subjected to the claims of the injured parties.

This rule does not go so far as to hold that creditors generally cannot resort to the ship owner's claim upon underwriters for the loss, after the loss has occurred, but only that the "owners of the injured property" cannot.

So that the general creditors of a bankrupt owner of an offending vessel might secure the greater part of their claims out of the insurance on the vessel, and the "owners of the injured property" be left wholly unpaid.

The time was when a seat in the New York Stock Exchange, which had cost, say $30,000, and more and could be sold for that amount, was held to be beyond the reach of creditors. But under the lead of the U. S. Courts that notion has been overthrown.

And we do not anticipate that the Court will see anything in the right of recovery for the loss of an offending vessel and her freight, *but a substantial property value that survives the loss of the vessel and her freight and takes their place, and is to be treated accordingly.*

(*b*) It is further objected that the contract of Marine insurance is to be classed as a land operation and the premium and investment in business on land.

But what said this Court in the case of Insurance Co. vs. Dunham, 11 Wallace, p. 1. The instructive opinion in that case is well worth perusal in full in this connection. This Court there compared the contract of Marine insurance to a contract of affreightment and declared it to be a *maritime* contract.

And in The *Dolphin*, 1 Flippin, 580, United States District Judge BROWN, in a very able opinion, held, on the strength of this decision of this Court, that the contract to pay the premium for Marine insurance was in like manner a *maritime contract*, and that the underwriters had a lien upon the vessel therefor.

And Emerigon says: "It should be considered that the premium of insurance is comprised in the expense of equipment or building; it becomes then, in some measure, *part of the thing insured*, which by this means is presumed to have an increased value."

Emerigon on Contract of Insurance, Chap. 3, Sec. 9, as quoted by Judge BROWN in the case of the *Dolphin*, 1 Flippin, pp. 286–7.

(*c*) But it is said that the contract of Marine insurance, which a shipowner holds, is so far not an interest in the vessel that, if he sells the vessel without in

terms assigning the policy, the policy will not pass to the purchaser.

But suppose he conveys all his right, title and interest in the vessel, and delivers the policy to the purchaser with the bill of sale, and the policy contains no clause against transfer, then it will be conceded the purchaser will take the policy as part of the interest conveyed.

So, too, an assignment in bankruptcy, or a general assignment for the benefit of creditors, would carry with it any policies of insurance.

And what hinders this Court from holding that the word "interest," as used in the statute, in view of all the bearings of the statute, is broader in its scope than the word "interest" as used in a mere bill of sale, and as including every guarantee against the loss of the vessel.

(*d*) It may also be said that the policy is not assignable without the consent of the company, but that depends upon whether it in terms requires such consent. And then, if the assignment comes about by operation of law, the want of consent will not avoid the policy, except, indeed, in very special cases.

But the conclusive answer to this objection is, *that the transfer to be made is not of the policy, but of the claim for loss after the loss has occurred, and that is always transferable, and the exercise of the right of transfer cannot be prevented by the underwriter, by any condition in the policy.*

A provision to this effect, declaring the law as it is settled, may be found in Field's Code, prepared for the State of New York.

Can there be any doubt of the validity of an agreement by a ship-owner, for the transfer of whatever might remain of his vessel at the end of her voyage, and of all claims for loss upon his policies of insurance on such vessel? Surely not.

(*e*) Small objections are also urged. It is said "What

claim has the injured party on the insurance? He never stipulated for any insurance being put on the vessel."

I agree that my client Rollins, as a passenger on the *Kate Dyer*, never stipulated with the owners of the *Scotland*, that they should have insurance on that vessel. Neither were they under any obligation to Rollins to take out insurance.

But the question is this, Rollins having been damaged by the *Scotland* (unexpectedly, of course) what redress does the law, on the facts as they *do* exist, afford him? The *Scotland* being insured and the owners having the insurance money in hand, the fact that this happens to be the situation enables the Court to say to the owners of the *Scotland*, "You have in fact so much of the value of the *Scotland* in hand as enables you to pay for the damage done, and we therefore think that under this statute you must pay."

(*f*) But it may be said this having or not having insurance is a matter of chance; sometimes there is insurance and sometimes not.

So, too, we say, all the circumstances of the injury are matters of chance, and cannot be foreseen. It is a matter of chance whether or not the offending vessel will be lost, or whether, if lost, the owner may have a right of recovery against some third party for the loss, or as to what claims may arise in general average, or for insurance—all is chance until the real situation is developed; and when it is developed the injured party must have the benefit of it, if favorable to him, and if not, then he must suffer accordingly.

(*g*) Something has been said of the unequal operation of the statute, under the construction claimed by us, upon small owners in ships, who, it is claimed, have greater occasion to insure than large capitalists, who are able to insure themselves, as the phrase is.

But I submit that this is a pure matter of conjecture, as to what class of persons insure the most.

Certainly in our case the respondents are large capitalists and they were insured.

I do not think the Court will enter upon any speculations of this sort.

Fifth. I furthermore submit that, if it were necessary to enable the Court to bring in that which the owner of the offending vessel has a right to recover for the loss of his vessel, to resort to the doctrine of subrogation, it seems to me that that doctrine would sustain such a course.

The risk of the offending vessel is thrown by operation of law upon the owners of the damaged property. That being a correct statement of the situation, it seems to follow, that in case of loss from that risk, the party to whom the risk has been so transferred would be entitled to be subrogated to all claims to recover for such loss, and that such claim would be substituted for that which was so lost.

A case somewhat in point is Spears vs. Matthews, 87 N. Y., 359.

E. N. TAFT,
Advocate.

BENEDICT, TAFT & BENEDICT,
Proctors for Rollins.

Office Supreme Court U. S.
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SUPREME COURT OF THE UNITED STATES.

JOSEPH W. DYER et al.,
Appellants,

vs.

THE NATIONAL STEAM NAVIGATION COMPANY,
Respondent.

BRIEF ON THE PART OF APPELLANTS

JAMES C. CARTER,
Of Counsel.

C. G. Burgoyne's "Quick" Print, 146-150 Centre St., N. Y.

SUPREME COURT OF THE UNITED STATES.

JOSEPH W. DYER ET AL.,
Appellants,

AGAINST

THE NATIONAL STEAM NAVIGATION COMPANY,
Respondent.

Preliminary Statement.

The fortunes of this suit well illustrate the possible vicissitudes of forensic strife. The disastrous collision between the sailing ship *Kate Dyer*, owned by the appellants, and the steamship *Scotland*, owned by the respondent, took place off Fire Island on the night of the 8th of September, 1866. The *Kate Dyer* was sunk outright. The *Scotland* received such injuries that she was obliged to return to New York, but grounded outside of the harbor, and a storm supervening, she sunk and was never raised.

The appellants filed a libel *in personam* against the respondent, which was a British corporation, and compelled an appearance by the execution of an attachment upon another ship of the respondent. They expected a struggle upon two points. Grave doubts had been entertained whether jurisdiction could be gained in a suit *in personam*, in the courts of the United States, by the process of attachment; and they knew that there would be a severe contest on the main ques-

tion, which ship was guilty of the fault which led to the collision.

The point was indeed formally taken by the answer that the respondent was not chargeable by reason of the fact that the *Scotland* was a total loss; but at that time there was little, if any, opinion to the effect that the provisions of the Act of 1851, limiting the liability of ship owners, extended to the case of injuries inflicted by the guilty ship in a collision upon the innocent one.

The suit was tried and decided in the District Court of the Eastern District of New York early in 1869. It was known that the Judge of that Court was of the opinion that jurisdiction in such cases could be gained through process of attachment, and this point was not presssd, but reserved for use on appeal. The point of limitation of liability was not even mooted. Upon the merits the decision was for the libellants (3 Ben., 173), and a decree for a very large sum was, after a reference, entered.

An appeal was taken to the Circuit Court, and the only ground of apprehension deemed serious by the libellants was the question of jurisdiction. They felt confident that the decision upon the merits would not be disturbed, and the question of the limitation of liability had never been deemed of importance by them. Pending this appeal, however, the case of the Norwich Company vs. Wright had been decided in this Court (13 Wall., 104, Dec., 1871), in which it had been held that the limitation of liability established by the Act of 1851 extended to the case of injuries inflicted upon another vessel in a collision. But this case did not determine that the limitation could be asserted by the guilty vessel, through a defense set up in the answer, without making a surrender of such vessel, or what might remain of her; nor by any affirmative petition for the benefit of the act presented after a decree upon the main question. The libellants, there-

fore, did not feel greatly alarmed for the result of the hearing upon the appeal on this ground. Circumstances occurred which delayed the argument of the appeal, and before it took place another decision was made by this Court, which removed from the case the question which, from the first, had given the libellants much concern. It was held in Atkins vs. The Disintegrating Company (18 Wall., 272, Oct., 1873), that jurisdiction could be gained in a suit *in personam* against a foreign corporation by the service of an attachment.

The appeal to the Circuit Court was not argued until 1878. Upon the argument the point was for the first time made that the liability of the owners of the *Scotland* was discharged by the loss of that vessel, and the Norwich Company vs. Wright was relied upon. But it appeared that there had been no surrender of what remained of the *Scotland* (and something did remain), and that no affirmative steps had been taken to assert the exemption. The Court held that this failure deprived the respondent of the benefit of the exemption, and upon the merits affirmed the decree.

An appeal was taken to this Court, and the libellants felt what they conceived to be a just confidence that the decision of the Circuit would be sustained. But before the cause was reached for argument this Court held in the case of Steamship Company vs. Mount (103 U. S., 239, October, 1880), that after a decree in a collision cause in favor of the libellant, in case the amount of the damages exceeded the value of the guilty vessel, the claimants in the collision suit might institute a proceeding by petition to assert for themselves the limitation of liability established by the Act of 1851. This was, indeed, a stroke which occasioned alarm to the libelants; but upon a scrutiny of that decision it appeared to them that while it might justify the owners of the *Scotland* in filing a petition to assert for themselves a limitation of liability, it would not aid them in asserting such liability in the pending

suit; and that, consequently, all questions arising upon such an attempt would be postponed until the owners of the *Scotland* should institute their affirmative proceeding. These owners, however, took no such affirmative proceeding, but awaited the argument of their appeal in this Court, and then insisted that they could in this suit avail themselves of the limitation established by the Act of 1851.

And so the Court determined. It was held (*The Scotland*, 105 U. S., 24), that the affirmative proceedings pointed out by the act and for which provisions were made by the rules of this Court, were but *one* mode of gaining the benefits of the act, and that the same benefit might be obtained by setting up the exemption from, or limitation of, liability in a purely *defensive* form in a plea, or answer, to a libel claiming damages; and that in such a suit the Court would determine the extent of the liability by ascertaining the value of the interests of the claimants in the offending vessel, and direct the payment of this amount into Court for distribution *pro rata* among the parties entitled thereto.

The mandate issued upon this decision was very general in its terms, directing the Circuit Court to "take such further proceedings as may be necessary "to carry out the principles laid down in the opinion "of this Court."

The position of the owners of the *Scotland* had always been, from the time when they first took any position upon the point of the limitation of liabitity, and the assertion in their answer was, that the *Scotland* was totally lost, and that they were consequently wholly *exempted* from any liability; but it appeared from the evidence that tackle, apparel, &c., of considerable value remained after the sinking available for sale and use; but as the claim was of *total* exemption, and the decisions in the Courts below denied *any* exemption, no inquiry had ever been had concerning the precise value of these or

other remains of the *Scotland*. It now became necessary that such inquiry should be had in the Circuit Court, and the regular mode of making it would be by an order made on the filing of the mandate directing a reference to a commissioner for that purpose. Prior to a proceeding for this purpose the question had been mooted whether moneys due or received upon an insurance upon the guilty vessel in a collision was not within the meaning of the Act of 1851, part of the "interest of the owner," and thus to be taken into account in any inquiry as to the value of such interest, and the libellants were advised that there were substantial grounds upon which the affirmative upon this question could be maintained.

For the purpose of having the inquiry concerning the value of "the interest" of the owners of the *Scotland* so prosecuted as to enable this question of insurance to be distinctly raised, the libelants sought to have a direction incorporated into the order of reference, directing the commissioner to take proofs in respect to any insurance upon the *Scotland;* but the learned Judge, then holding the Circuit Court (Mr. Justice WALLACE), hesitated to make an order not explicitly pointed out by the mandate, and the entry of any order was deferred in order to give the libellants an opportunity to apply to this Court for an amendment of, or addition to, the mandate. Such an application was afterwards made to this Court, which refused to entertain it on the ground that it called for an amendment of its decree after the term at which it was rendered.

Subsequently, at a Circuit Court, held by Mr. Justice BLATCHFORD, the motion for the appropriate order upon the mandate was renewed, and the libelants then asked to have it so framed as to enable the question respecting the insurance to be more directly and conveniently raised. The Court, thereupon, in the order made, gave the libelants leave to file a supplimental

allegation upon the matter of insurance, and leave to both parties to introduce evidence before the Commissioner relating to matters averred in such supplemental allegation—all, however, without prejudice to any right then subsisting of respondents to insist that the question of insurance was immaterial, or had been disposed of by the judgment of the Supreme Court (pp. 7, 8).

The supplemental allegation was filed, and it was proved before the commissioner and reported by him, that the respondents had received within nine months after the collision, under policies of insurance upon the *Scotland* large sums of money, amounting to $299,867.42.

The cause was brought to hearing upon this report, and findings of fact were made by the Court in accordance with the report; but, upon the suggestion, assented to by both parties and approved by the learned Judge (Mr. Justice BLATCHFORD), a decision *pro forma* and without argument was made, adverse to the claim of the libelants, to the end that the question might at once be taken to the Supreme Court.

Exceptions were duly taken, by the libellants, to the decision; and from the decree entered thereon the present appeal has been taken.

POINTS.

First Point. The suggestion, should any be made, that the question of insurance, as affecting the value of the interest of the owners of the *Scotland*, cannot be now agitated is erroneous.

1. The strict point of *res adjudicata* cannot be made by the respondents. That defense, strictly speaking, invokes the judgment in one

suit as a bar to the re-agitation of the same matter in a *subsequent* suit. And although in such cases it is not always necessary to show that the matter was ~~not~~ *actually* discussed and determined in the first suit, but it is often sufficient to show that it *might* have been, yet in this case there has been no *prior* suit. The only suit brought has not yet been determined. It is still pending.

There is no final judgment, in *another prior* suit, to be set up as a bar.

2. If it be urged that upon a principle analogous to the doctrine of the defense of *res adjudicata* Courts will not, even in the same suit, and before final decree, allow questions to be agitated which were, or ought to have been, agitated and decided at some previous stage in the same suit, it is enough to say that the objection is quite under the control of the *discretion* of the Court, and that such discretion should not, under the peculiar circumstances of this case, be exercised to deprive the appellants of the opportunity of presenting their claim.

(*a*) The Court can hardly fail to be impressed with the consideration that the whole question is essentially novel. An opinion was widely entertained in the profession prior to the decision in The Norwich Company vs Wright (13 Wall., 104), at variance with that decision; and that since that time great doubt and uncertainty have existed as to the mode in which a limitation of liability under the Act of 1851 should be asserted, and as to the questions arising upon such an assertion.

These are reasons for the extension of indulgence in the matter of procedure—an indulgence of which the respondent has in this case received a large share.

3. But there is no occasion for astuteness to save a remedy. The present stage of the controversy is the one most appropriate for the disposition of the question in dispute. It has never yet been in fact raised, and, according to the regular method of procedure in such cases, it could not before have been raised.

(*a*) In most systems of judicial procedure, except on jury trials, a division is made between the questions arising in suits in respect of the manner in which they are to be disposed of. The main questions which *must* be decided in order to put the controversy at rest are first decided on the principal hearing. But it frequently happens that in order to adjust all the details which a full determination of the suit requires, new inquiries are to be made, subordinate facts ascertained, computations of amounts to be had, or accounts taken and stated. Questions both of law and fact, and often many important ones, may arise in the course of such proceedings; but no attempt is in general made to anticipate them at the first hearing on the main question. The general method is to first decide those issues which it is necessary to decide in order to determine the *general* nature of the judgment or decree, and leave the rest to be determined by a reference.

The general nature of the present decree is that the respondents were liable for the

damages sustained by the libelants in consequence of the collision to the extent of the value of their interest in the *Scotland*. Had this decree been rendered in the first instance by the District Court that Court would have directed a reference to inquire into the amount of the value of this interest as well as to ascertain the amount of the libelants' damage. It would not itself have listened to evidence upon either of these subjects. This Court now directs the Circuit Court to do what the District Court ought to have done. Neither the District nor the Circuit Courts would, upon the hearing upon the main question, inquire concerning the precise amount of the wreckage of the *Scotland* or its value. Such an inquiry is properly reserved for the reference under the interlocutory decree. The present order of reference directs it to be made, In like manner the inquiry into any other circumstance, like that of insurance, affecting the interest of the owners of that vessel is properly reserved for the same inquiry.

In a very rigid sense, therefore, the direction in the order of reference to inquire and report concerning the matters of insurance was perfectly regular.

Second Point. The question, shortly stated, is, "What is included under the words '*amount or* "'*value of the interest of such owner in such ves-*" '*sel and her freight then pending*,' contained in "section 4283 of the R. S.?" In the determination of this question much depends upon the principles of interpretation which are to be applied in ascertaining the real intent of the Legislature.

1. If this question be viewed in the light only in which the sufficiency of a declaration, or the terms of a written conveyance *inter partes* are considered, the conclusion might easily be reached that, as an assignment or transfer of the subject of insurance does not ordinarily carry the insurance with it as an incident, the two things are independent and distinct; and, consequently, that insurance cannot in this statute be embraced under the terms "amount or value of the interest of such owner."

2. If, upon the other hand, we view the enactment in question as one effecting changes in the law governing *the responsibility of public carriers*—a most important branch of the public policy of States—reasons very speedily appear which lead to the conclusion that Congress must have designed that the ordinary insurance by a ship owner against a sea peril should be regarded as *incidental* to, and therefore, a part of, the subject insured.

Third Point. The interpretation of the statute in question cannot properly be removed from the control of those considerations of public policy from which the statute itself springs.

1. It is first to be observed that the principal field of the operation of this act is the relations between carriers and the shippers of goods. By general law a most rigorous liability is imposed

upon public carriers for the safety of goods and passengers. This responsibility is so severe that, as to goods, they are declared to stand in the place of *insurers;* and as to passengers, they are held to be bound to the exercise of the highest decree of diligence. These rigorous obligations are imposed, not because they are dictated by natural justice, but in accordance with the supposed necessities of a sound *public policy.*

In the view of that policy, the requisite measure of diligence can be secured only by that ever present sense of its necessity which is produced by the imposition of this severe obligation.

Railroad Company vs. Lockwood, 17 Wall., 357, 377, *et seq.*

2. Again, the public carrier is subjected to this rigid liability, not only in respect to his own acts, but also in respect to the acts of his agents and servants; and this rule has been adopted, not in obedience to any principle of natural justice, but as an offspring of a sound view of *public policy.*

Railroad Co. vs. Lockwood, *ubi supra.*

3. There has been from time immemorial in many continental nations, and more recently by express statute in this country, a relaxation of this severe obligation in respect to carriers by *water;* and such relaxation, like the rule itself, springs from the teachings of *public policy,* being an indulgence designed to encourage the building and employment of ships.

Norwich Co. vs. Wright, 13 Wall., 103, 121.

4. Whether this statutory relaxation was appli-

cable in the Courts of the United States to controversies in which foreign vessels were parties was an open question until its decision by this Court in this case, and such decision as to the intent of Congress was avowedly placed by this tribunal upon like considerations of public policy.

The *Scotland*, 105 U. S., 24, 33.

5. So, also, serious question has been made as to whether, in ascertaining the value of an owner's interest, for the purpose of determining the extent of his liability, the value is to be taken before, or after, the casualty. Either construction of the statute is admissible; but, reasoning from grounds of public policy and imputing to Congress the intent to act in accordance therewith, it has been determined that the value to be ascertained is the value of the interest *after* the happening of the casualty.

Norwich Co. vs. Wright, *ubi supra* and 127.

Fourth Point. Applying the same methods to the determination of the question now brought before the Court, there should be little doubt that the true construction of the language "the amount or value of the interest of such owner," should embrace any insurance upon such interest.

1. Clearly there is nothing in this language which *excludes* such interpretation. In common understanding a policy of insurance is *incidental* to the subject insured, and it is entirely consistent with propriety of speech to say that there are two kinds of interests in ships: one, an *insured* interest; and the other, an *uninsured* interest.

2. In all ordinary dealings the insurance is treated as simply incidental to the subject insured. Whenever there is a sale of the subject, be it ship or cargo, the insurance is transferred, along with the subject to the purchaser. Such transfer of the insurance may or may not require some separate act, in the nature of an assignment, to be performed. In one class of cases, namely, those in which the insurance is for the benefit of whoever may be interested at the time of loss, the insurance is, by its very terms, incidental to the subject insured and passes with it; but in other cases in which no such language is employed the insurance, as a general rule, is, in fact, regarded none the less as incidental to the subject. The mere circumstance that an additional act is requisite in order to effect a transfer of the interest in case of a sale is quite immaterial.

Phillips on Insurance, § 76.
2 Duer on Insurance, § 35.

3. There are two considerations which ought to be conclusive upon the present question.

(*a*) By the general law a public carrier cannot by special contract relieve himself from the obligation of exercising diligence; nor can he, it is assumed, directly protect himself by insurance against any loss or damage which he may sustain by reason of being obliged to pay damages to others for the consequences of his want of dilgence. But, unless in cases like the present, the amount of an insurance upon the offending vessel is, in case of loss, to be made subject to the claims of those who have suffered damage from such offending vessel, the the plain consequence is that the owner of the

guilty ship is enabled by the mere fact of an insurance upon his interest to achieve two things: *first*, full indemnity to himself for the loss of his own property; *second*, complete exemption from liability for the consequences of his own culpable negligence. Can Congress be supposed to have intended the introduction of any such incongruity into the law governing the obligation of carriers?

(*b*) If the owner of the guilty vessel is entitled, in case of the loss of such vessel by a peril subsequent to the casualty, and before the termination of the voyage, to take to himself the proceeds of an insurance on his interest, then this further striking incongruity is brought about. One ship, through culpable negligence, sinks another, and the owners of the former become liable to pay therefor $100,000. The offending ship remains intact and prosecutes her voyage. If such voyage is completed in safety, the ship must be yielded up to satisfy the demands of her victim. If she is lost, those demands are absolutely extinguished by that mere fact, and the proceeds of the insurance are gathered by the owners of the guilty vessel. What situation does the master of the guilty vessel occupy in such a case, after the casualty and before the loss? By the sacrifice of his vessel he may earn a hundred thousand dollars for his owners. If he performs his duty, it is only to the detriment of his owners and to the advantage of strangers. Did Congress design any such anomaly as this?

4. The only obstacles in the way of the interpretation, upon which we insist arise from the mere

circumstance that a policy of insurance, not issued for the benefit of whom it may concern at the time of the loss, is non-negotiable. The contract of the underwriters, in such cases, is to insure a particular person in reference to the subject. While the contract remains *executory*, the person insured cannot be changed without the consent of the underwriters; and though the giving of such consent, when asked for, is a matter of course, it may be withheld. But for this, policies of marine insurance would have been treated as entirely negotiable, and have passed as incidental to the subject of the insurance upon any transfer.

It is the opinion of the best authorities that whenever, by any policy of insurance, it is the *contemplation* of the parties thereto, in whatever manner such contemplation may be made manifest, that the insurance should pass with any transfer of the subject, such insurance is wholly *incidental* to the subject, and will pass upon any such transfer. Is it too much to say that whenever any insurance is effected, the result of which may be to call upon underwriters to indemnify the owner for the loss of a ship which has charged herself with a lien for damages to others occasioned by negligence, that there will be *imputed* to the parties to that insurance an intention that the proceeds of the policy should go to indemnify the sufferers, and not those who inflicted the damage? It is in accordance with fundamental maxims of jurisprudence never to impute to parties an intent to accomplish an unjust or illegal end, but, on the other hand, to impute to them such a purpose as will lead to the accomplishment of a just and equitable result.

Phillips on Insurance, §§ 89, 104.

5. It is well established that where the owner of an insured interest sells it, assuming to stand as trustee of it for the benefit of the purchaser, he will hold a policy of insurance on the subject as such trustee. Is it not the real substance and intended effect of the law establishing the limitation of liability, that upon the happening of a casualty, such as a collision, whereby in consequence of negligence imputable to the owner of a vessel, such vessel is charged with a lien in favor of persons upon whom loss has been inflicted, such owners really stand as trustees of the subject, for the benefit of those who have sustained the loss, and hold any policy of insurance upon such subject as such trustees?

6. The ground upon which it has been held that in these cases the value of the vessel is to be taken, as it was *after* the casualty, and not before, and subject also to the further hazards of the then pending voyage, is that otherwise the owner might be called upon to pay out something *in addition* to his interest in the ship, whereas the design of the statute evidently is to protect him against additional hazard.

The doctrine herein contended for in no degree conflicts with this position, or the reasoning upon which it is based. The ship owner may insure or not insure, as he may prefer, and whether he insures or not, he can never be called upon to sacrifice anything but his interest in the vessel, together with any insurance he may have effected.

7. It appears plain that the doctrine above maintained is in harmony with every principle of equity, and preserves the integrity of those rules heretofore deemed so essential to the maintenance of care and diligence on the part of public carriers. The contrary doctrine tends directly to diminish the force of the motives to diligence, and is inconsistent with the fundamental rules governing the liability of carriers.

Surely, it seems that the equitable doctrine should not be overcome by the technical consideration, that the ordinary policy of insurance does not pass with an assignment or transfer of the subject named.

8. We have no means of knowledge as to the *form* of any insurance upon the *Scotland;* but if any such insurance is, by its language, designed to be for the benefit of whomsoever may thereafter be interested in the subject, it would seem that even the supposed technical difficulty would not, in that case, arise.

9. It may possibly be objected that the doctrine for which we contend compels the application of the *premium* paid for the insurance to the payment of the damages. One answer to this is, that in estimating the nature of the insurance, for the purpose of ascertaining the extent of the liability, or in making any assignment of it, in order to obtain exemption from further liability, there is no insuperable difficulty in making an allowance or deduction for the premium.

But the better answer is, that the procuring of insurance by the payment of a premium is only a mode of *adding to the value of the subject insured*, which the owner is at liberty to avail himself of or not, as he may choose. *It is a part of the owner's investment* in the adventure. One man might prefer to build his ship of iron instead of wood, and dispense with insurance; another might think it better economy to build of wood, and expend the additional cost of an iron vessel upon insurance. In either case, the whole amount expended is *invested* in the adventure, and it is the amount of this investment, or what may survive of it, which the law fixes as the limit of liability.

Finally. Upon the above grounds, it is confidently submitted that, for the purposes of determining the liability of the Navigation Company, the value of the interest of that company in the *Scotland*, if covered by insurance, must be the value of the interest as insured.

The decree appealed from should therefore be reversed and the cause remanded with instructions to enter a decree in conformity with directions to be given.

JAMES C. CARTER,
Of Counsel for Appellants.

Supreme Court, U.S.
FILED
OCT 16 1885
JAMES R. McKENNEY,
CLERK.

Supreme Court of the United States.

JOSEPH W. DYER et al.,
Appellants,

vs.

THE NATIONAL STEAM NAVIGATION COMPANY,
Respondent.

BRIEF ON THE PART OF APPELLANTS.

JAMES C. CARTER,
Of Counsel.

The Evening Post Job Printing Office, 206 & 208 Broadway, N. Y.

Supreme Court of the United States.

JOSEPH W. DYER ET AL.,
Appellants,

AGAINST

THE NATIONAL STEAM NAVIGATION COMPANY,
Respondent.

PRELIMINARY STATEMENT.

The fortunes of this suit well illustrate the possible vicissitudes of forensic strife. The disastrous collision between the sailing ship *Kate Dyer*, owned by the appellants, and the steamship *Scotland*, owned by the respondent, took place off Fire Island on the night of the 8th of September, 1866. The *Kate Dyer* was sunk outright. The *Scotland* received such injuries that she was obliged to return to New York, but grounded outside of the harbor, and a storm supervening, she sank and was never raised.

The appellants filed a libel *in personam* against the respondent, which was a British corporation, and compelled an appearance by the execution of an attachment upon another ship of the respondent. They expected a struggle upon two points. Grave doubts had been entertained

whether jurisdiction could be gained in a suit *in personam* in a Court of the United States against a foreign corporation by the process of attachment; and they knew that there would be a severe contest on the main question, which ship was guilty of the fault which led to the collision.

The point was indeed formally taken by the answer that the respondent was not chargeable by reason of the fact that the *Scotland* was a total loss; but at that time there was little, if any, opinion to the effect that the provisions of the Act of 1851, limiting the liability of ship owners, extended to the case of injuries inflicted in a collision upon the innocent ship.

The suit was tried and decided in the District Court of the Eastern District of New York early in 1869. It was known that the judge of that Court was of the opinion that jurisdiction in such cases could be gained through process of attachment, and this point was not pressed, but reserved for use on appeal. The point of limitation of liability was not even mooted. Upon the merits the decision was for the libellants (3 Ben., 173), and a decree for a very large sum was, after a reference, entered.

An appeal was taken to the Circuit Court, and the only ground of apprehension deemed serious by the libellants was the question of jurisdiction. They felt confident that the decision upon the merits would not be disturbed, and the question of the limitation of the liability had never been deemed of importance by them. Pending this appeal, however, the case of the Norwich Company *vs.* Wright had been decided in this Court (13 Wall., 104, Dec., 1871), in which it had been held that the limitation of liability established by the Act of 1851 extended to the case of injuries inflicted upon another vessel in a collision. But this case did not determine that the limitation could be asserted by the guilty vessel, through a defense set up in the answer, without making a surrender of such vessel, or what might remain of her; nor that it could be asserted in any form if the attempt was not made until after a decree upon the main question. The libellants, therefore, did not feel greatly alarmed for the result of the hearing upon the appeal on this ground. Circumstances occurred which de-

layed the argument of the appeal, and before it took place another decision was made by this Court, which removed from the case the question, which, from the first, had given the libellants much concern. It was held, in Atkins *vs.* The Disintegrating Company (18 Wall., 272, Oct., 1873), that jurisdiction could be gained in a suit *in personam* against a foreign corporation by the service of an attachment.

The appeal to the Circuit Court was not argued until 1878. Upon the argument the point was for the first time made that the liability of the owners of the *Scotland* was discharged by the loss of that vessel, and the case of the Norwich Company *vs.* Wright was relied upon. But it appeared that there had been no surrender of what remained of the *Scotland* (and something did remain), and that no affirmative steps had been taken to assert the exemption. The Court held that this failure deprived the respondent of the benefit of the exemption, and upon the merits affirmed the decree.

An appeal was taken to this Court, and the libellants felt that every serious ground of apprehension had been removed. But before the cause was reached for argument this Court held in the case of Steamship Company *vs.* Mount (103 U. S., 239, October, 1880), that after a decree in a collision cause in favor of the libellant, in case the amount of the damages exceeded the value of the guilty vessel, the claimants in the collision suit might institute a proceeding by petition to assert for themselves the limitation of liability established by the Act of 1851. This, was, indeed, a stroke which occasioned alarm to the libellants; but upon a scrutiny of that decision it appeared to them that while it might justify the owners of the *Scotland* in filing a petition to assert for themselves a limitation of liability, it would not aid them in asserting such limitation in the pending suit; and that, consequently, all questions arising upon such an attempt would be postponed until the owners of the *Scotland* should institute their affirmative proceeding. These owners, however, took no such affirmative proceeding, but awaited the argument of their appeal in this Court, and then insisted that they

tice Blatchford), a decision *pro forma* and without argument was made, adverse to the claim of the libellants, to the end that the question might at once be taken to the Supreme Court.

Exceptions were duly taken, by the libellants, to the decision; and from the decree entered thereon the present appeal has been taken.

POINTS.

First Point.—The suggestion, should any be made, that the question of insurance, as affecting the value of the interest of the owners of the *Scotland*, cannot be now agitated is erroneous.

1. The strict point of *res adjudicata* cannot be made by the respondents. That defense, strictly speaking, invokes the judgment in one suit as a bar to the re-agitation of the same matter in a *subsequent* suit. And although in such cases it is not always necessary to show that the matter was not *actually* discussed and determined in the first suit, but it is ofen sufficient to show that it *might* have been, yet in this case there has been no *prior* suit. The only suit brought has not yet been determined. It is still pending.

   There is no final judgment, in *another prior* suit, to be set up as a bar.

2. If it be urged that upon a principle analogous to the doctrine of the defense of *res adjudicata* Courts will not, even in the same suit, and before final decree, allow questions to be agitated which were, or ought to have been, agitated or decided at some previous stage in the same suit, it is enough to say that the objection is quite under the control of the *discretion* of the Court, and that such discretion

should not, under the peculiar circumstances of this case, be exercised to deprive the appellants of the opportunity of presenting their claim.

(*a.*) The Court can hardly fail to be impressed with the consideration that the whole question is essentially novel. An opinion was widely entertained in the profession prior to the decision in The Norwich Company *vs.* Wright (13 Wall., 104), at variance with that decision; and that since that time great doubt and uncertainty have existed as to the mode in which a limitation of liability under the Act of 1851 should be asserted, and as to the questions arising upon such an assertion. These are reasons for the extension of indulgence in the matter of procedure—an indulgence of which the respondent has in this case received a large share.

3. But there is no occasion for astuteness to save a remedy. The present stage of the controversy is the one most appropriate for the disposition of the question in dispute. It has never yet been in fact raised, and, according to the regular method of procedure in such cases, it could not before have been raised.

(*a.*) In most systems of judicial procedure, except on jury trials, a division is made between the questions arising in suits in respect of the manner in which they are to be disposed of. The main questions which *must* be decided in order to put the controversy at rest are first decided on the principal hearing. But it frequently happens that in order to adjust all the details which a full determination of the suit requires, new inquiries are to be made, subordinate facts ascertained, computations of amounts to be had, or accounts taken and stated. Questions both of law and fact, and often many important ones, may arise in the course of such proceedings; but no attempt is in

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general made to anticipate them at the first hearing on the main question. The general method is to first decide those issues which it is necessary to decide in order to determine the *general* nature of the judgment or decree, and leave the rest to be determined by a reference.

The general nature of the present decree is that the respondents were liable for the damages sustained by the libellants in consequence of the collision to the extent of the value of their interest in the *Scotland*. Had this decree been rendered in the first instance by the District Court, that Court would have directed a reference to inquire into the amount of the value of this interest, as well as to ascertain the amount of the libellants' damage. It would not itself have listened to evidence upon either of these subjects. This Court now directs the Circuit Court to do what the District Court ought to have done. Neither the District nor the Circuit Courts would, upon the hearing upon the main question, inquire concerning the precise amount of the wreckage of the *Scotland* or its value. Such an inquiry is properly reserved for the reference under the interlocutory decree. The present order of reference directs it to be made. In like manner the inquiry into any other circumstance, like that of insurance, affecting the interest of the owners of that vessel is properly reserved for the same inquiry.

In a very rigid sense, therefore, the direction in the order of reference to inquire and report concerning the matters of insurance was perfectly regular.

(*b.*) Indeed, if the reference before the Commissioner had been proceeded with under an order following the general language of the mandate of this Court, and not mentioning the subject of insurance, the Commissioner would have been bound to receive evidence upon that subject, if the law be, as we assert it is, that insurance is

embraced under the term "value of the interest of such owner."

Second Point.—The question, shortly stated, is, "What "is included under the words '*amount or value of the* "'*interest of such owner in such vessel and her freight* "'*then pending,*' contained in section 4,283 of the R. "S.?" In the determination of this question much depends upon the principles of interpretation which are to be applied in ascertaining the real intent of the Legislature.

1. If this question be viewed in the light only in which the sufficiency of a declaration, or the terms of a written conveyance *inter partes* are considered, the conclusion might easily be reached that, as an assignment or transfer of the subject of insurance does not ordinarily carry the insurance with it as an incident, the two things are independent and distinct; and, consequently, that insurance cannot in this statute be embraced under the terms "amount or value of the interest of such owner in such vessel."

2. If, upon the other hand, we view the enactment in question as one effecting changes in the law governing *the responsibility of public carriers*—a most important branch of the public policy of States—reasons very speedily appear which lead to the conclusion that Congress must have designed that the ordinary insurance by a ship owner against a sea peril should be regarded as *incidental* to, and, therefore, a part of the subject insured, when the value of that subject is to be determined for the purpose of ascertaining the extent of its liability for injuries inflicted by it.

Third Point.—The principal argument by which the view that the proceeds of insurance are not to be taken into account has been hitherto supported is that "*the statute does not speak of anything but the vessel.*" But this reasoning wholly misses the real point. Indeed it rather *assumes* that "*vessel,*" as used in the statute, was not designed to embrace anything but the *material* structure. But this is the very point in controversy.

Fourth Point.—The proposition, directly or indirectly, asserted that the term "vessel" must be confined to the physical *res*, or, in case of loss, its physical remnant, must be at once dismissed as quite untenable.

1. Take, for instance, the case which may well occur, where the guilty vessel in a collision is subsequently lost by the guilty act of a third party against whom a right of action would arise in favor of her owners; the case, for instance, of a subsequent loss by collision, or capture. Could it be seriously argued that the guilty vessel could exonerate herself under the statute without surrendering the right of action, or *spes recuperandi?*

2. Or the case where the guilty vessel having survived the collision, is afterwards voluntarily stranded, and becomes entitled to a contribution in general average from the owners of cargo saved. Can there be a doubt that whatever value of the ship is thus *saved* would be deemed part of "the interest of the owners in such vessel" within the meaning of the act?

3. It will hardly do to say that these cases raise only a question concerning the *time* as of which the value is to be computed. It concerns the subject-matter

embraced under the term "*vessel;*" for the owner can always exonerate himself at his own pleasure by surrendering his interest in that *subject*, and unless the right of action, or *spes recuperandi* in the cases supposed are *part of that subject*, as being incidental thereto, the owner would not be obliged to surrender them.

Fifth Point.—But there is another and distinct ground upon which the claims of the innocent sufferers to the proceeds of insurance are resisted. This is, not that such proceeds are an immaterial thing, differing in their nature from the "*vessel;*" but that they are the fruit of an *independent personal contract* between the owners and the insurers, to which the sufferers are total *strangers*, and that they cannot assert a claim upon such proceeds any more than a mortgagee could.

The argument here is that Congress should not be deemed to have intended that the fruits of insurance should go as a substitute for the vessel, *because it would not be just*, inasmuch as such proceeds belong, *ex æquo et bono*, to the owners. We agree that this reasoning appeals to a true principle of interpreting this statute, and whichever party conquers in the contention to whom the proceeds of insurance *ex æquo et bono* belong, establishes his construction. We assert that they belong to the innocent sufferers.

1. In this inquiry we are permitted to appeal to, or rather we are *bound to regard*, that system of *public policy*, of which the statute itself is a part; and it is first to be observed that the principal field of the operation of this act is the relations between carriers and the shippers of goods. By general law a most rigorous liability is imposed upon public carriers for the safety of goods and passengers. This responsibility is so severe that, as to goods, they are

declared to stand in the place of *insurers;* and as to passengers, they are held to be bound to the exercise of the highest degree of diligence. These rigorous obligations are imposed, not because they are dictated by natural justice, but in accordance with the supposed necessities of a sound *public policy.*

In the view of that policy, the requisite measure of diligence can be secured only by that ever present sense of its necessity which is produced by the imposition of this severe obligation.

Railroad Company *vs.* Lockwood, 17 Wall., 357, 377, *et seq.*

2. Again, the public carrier is subjected to tihs rigid liability, not only in respect to his own acts, but also in respect to the acts of his agents and servants; and this rule has been adopted, not in obedience to any principle of natural justice, but as an offspring of a sound view of *public policy.*

Railroad Co. *vs.* Lockwood, *ubi supra.*

3. There has been from time immemorial in many continental nations, and more recently by express statute in this country (the act in question), a relaxation of this severe obligation in respect to carriers by *water;* and such relaxation, like the rule itself, springs from the teachings of *public policy,* being an indulgence designed to encourage the building and employment of ships.

Norwich Co. *vs.* Wright, 13 Wall, 103, 121.

4. Whether this statutory relaxation was applicable to the Courts of the United States to controversies in which foreign vessels were parties was an open question until its decision by this Court in this case, and such decision as to the intent of Congress was avowedly placed by this tribunal upon like considerations of public policy.

The *Scotland,* 105 U. S., 24, 33.

5. So, also, serious question has been made as to whether in ascertaining the value of an owner's interest, for the purpose of determining the extent of his liability, the value is to be taken before, or after, the casualty. Either construction of the statute is admissible; but, reasoning from grounds of public policy and imputing to Congress the intent to act in accordance therewith, it has been determined that the value to be ascertained is the value of the interest *after* the happening of the casualty.

Norwich Co. *vs.* Wright, *ubi supra* and 127.

6. There are two considerations which ought to be conclusive upon the present question.

(*a.*) By the general law a public carrier cannot by special contract relieve himself from the obligation of exercising diligence; nor can he, it is assumed, directly protect himself by insurance against any loss or damage which he may sustain by reason of being obliged to pay damages to others for the consequences of his want of diligence. But, unless in cases like the present, the amount of an insurance upon the offending vessel is, in case of loss, to be made subject to the claims of those who have suffered damage from such offending vessel, the plain consequence is that the owner of the guilty ship is enabled by the mere fact of an insurance upon his interest to achieve two things, *first*, full indemnity to himself for the loss of his own property; *second*, complete exemption from liability for the consequences of his own culpable negligence. Can Congress be supposed to have intended the introduction of any such incongruity into the law governing the obligation of carriers?

(*b.*) If the owner of the guilty vessel is entitled in case of the loss of such vessel by a peril subsequent to the casualty, and before the termination of the voyage, to take to himself the proceeds of an

insurance on his interest, then this further striking incongruity is brought about. One ship, through culpable negligence, sinks another, and the owners of the former become liable to pay therefor $100,000. The offending ship remains intact and prosecutes her voyage, If such voyage is completed in safety, the ship must be yielded up to satisfy the demands of her victim. If she is lost, those demands are absolutely extinguished by that mere fact, and the proceeds of the insurance are gathered by the owners of the guilty vessel. What situation does the master of the guilty vessel occupy in such a case, after the casualty and before the loss? By the sacrifice of his vessel he may earn a hundred thousand dollars for his owners. If he performs his duty, it is only to the detriment of his owners and to the advantage of strangers. Did Congress design any such anomaly as this?

Sixth Point.—There is a method of approaching the main question somewhat distinct from that above pursued, but which conducts us to the same conclusion.

1. Upon the sinking of the *Kate Dyer* through the fault of the *Scotland*, the latter was held by her owners in equitable and substantial sense as *trustees* for the owners of the former and her cargo. This is manifest from various considerations. By the general maritime law the owners of the *Kate Dyer* had a *lien* upon the *Scotland* for the amount of their damages, and an equitable *interest* in her to that extent. By the Act of 1851, the *Scotland* was effectually made the *sole fund* to which resort could be made to satisfy those damages, and that act further made the *Scotland* the *inchoate* property,

so to speak, of the owners of the *Kate Dyer* by compelling them to *accept* her as and for their damages upon the tender of her owners. And this trust relation is made at once manifest by the circumstance that the owners of the *Scotland* after the collision were bound in favor of the owners of the *Kate Dyer* to the *care and diligence* of trustees. They could not have surrendered her remains in exoneration of their liability if she had been subsequently shipwrecked in consequence of their negligence.

2. This trust relation becomes still more clearly manifest by making the inquiry to whom had the owners of the *Scotland* insured her *after* the collision, the proceeds of insurance would have belonged in case of a loss. Manifestly to the owners of the *Kate Dyer*. It never would be endured in any tribunal capable of administering complete justice that a person in whom the legal title of property was vested, and who had the custody of it when that property was subject to a lien to secure a debt due from such owner and which was the *sole fund* to which the creditor could resort for satisfaction of his debt, and which the debtor could turn over to his creditor in *full exoneration of his liability*, should insure it for his own exclusive benefit. Such an insurance would be necessarily *hostile* to an interest as to which, *being in his custody*, he was bound to exercise the ordinary duties of a custodian. He could not *create* for himself a direct and powerful temptation to sacrifice such interest. As well might any trustee of property holding it for the benefit of another insure it, and in case of loss and after recovery of the proceeds of the policy refuse to account to his *cestui que trust* on the ground that he was not bound to insure.

3. Is the argument at all affected by the circumstance that the insurance was effected *before*, instead of *after* the collision? Surely not; it is enough that

the collision existed *potentially* at the time of the insurance. The *Scotland* begun her voyage under an obligation to use care and diligence towards other vessels, and under a *possibility* that she might fail. She was the *only fund* from which her obligations to others arising out of her guilty failure could be satisfied. Her *trusteeship*, although *inchoate*, must be regarded as subsisting, and all its liabilities with it. She might, by her guilty act, subject herself to liability to others, and at the same time extinguish that liability by destroying the only fund out of which the liability could be satisfied. Can she save herself harmless by insurance from any loss by such negligence?" Not unless a public carrier can protect himself by a policy in express terms providing indemnity against damages inflicted upon others by his culpable negligence; and this, we suppose, it cannot be necessary for us to refute. Inasmuch as he is a trustee *in posse*, any insurance effected by him must be in like manner *in posse*, for the benefit of his *cestui que trust*, and become in fact for the benefit of that party when the event occurrs which converts the possible into an actual trusteeship.

4. It may be argued, that in thus asserting that an insurance effected by the public carrier must, in the event of injury inflicted upon others for which the carrier is responsible be deemed to be for the benefit of the injured party, and in placing the ground of the proposition upon the circumstance that otherwise the carrier would be insuring himself against his own negligence, we really show that the insurance is illegal and void; not that the proceeds belong to the injured parties. But there is no foundation for such a suggestion. The insurance on which the owners of the *Scotland* have received indemnity is not one which *purports* to be for losses sustained by their payment of damages exacted from them by others for their culpable negligence. There could be no recovery from the un-

derwriters, as yet, for such a loss, even if such an insurance were a legal contract, which it would not be. These owners have sustained no such loss, nor indeed, incurred any such liability. Not only have they never *paid* any such damages, but the loss of their ship has relieved them *pro tanto* from the liability even.

The loss for which they have received indemnity is the loss sustained by *them* for the *destruction of their own ship.* It is true that such loss has been brought about by the negligence of their own servants, but it has been rightly held that under an insurance against the perils of the sea, including, as it does, collision, the insured may recover upon simply proving a loss by collision, and it is no defense for the underwriter to allege and prove that the collision was occasioned by the negligence of the officers or crew of the insured ship. This is perfectly consistent with sound policy. It is an implied condition of the contract that the ship is seaworthy, that is to say, among other things, that the insured has done his best to select competent and skillful officers and crew, and to protect himself after having discharged this duty against their possible negligence is a fair object of insurance.

Phillips on Ins. Vol. 1, §1048.

5. An argument against the above reasoning may be sought in the decisions which hold that an insurance by a mortgagor cannot be laid hold of by the mortgagee on account of his debt. This is true in the bald case, where the insurance was independently effected by the mortgagor for his own exclusive benefit, and not for the benefit of the mortgagee, and has no relevancy to the case where the insurance is for the benefit of the mortgagee. And if it be asked what evidence there is that the insurance in this case was for the benefit of the sufferers from some possiblle collision, we have but to repeat what has already been said, that the public

carrier by water is charged with an inchoate trust, which makes it impossible for him to insure in such a case as the present, except as trustee.

But let the analogy be made complete by adding to the case of mortgagor and mortgagee thus appealed to the elements that there is a provision in the mortgage that, upon a loss of the property insured by fire, the debt shall be extinguished and a distinct obligation of the mortgagor to the mortgagee that he will use care and diligence in respect of the property and the further element that the loss is occasioned by the negligence of the mortgagor or his servants, and then we imagine that there would be little difficulty in maintaining the proposition that an insurance by the mortgagor must be for the benefit of the mortgagee.

6. The above reasoning is fully confirmed by the authorities, which hold that where the owner of an interest insured sells it, assuming to stand as trustee of it for the purchaser, he can, nevertheless, in case of loss, collect the insurance ; but the proceeds stand charged with the same trust, and he must account to his vendee. Precisely such a transfer took place in the case of the *Scotland* immediately upon the happening of the collision by her culpable fault. Before that event her owners had the absolute title unincumbered by any trust, except a trust *in posse*. After it they held as trustees.

Phillips on Ins., §§ 292, 422.

7. But finally it may be argued that, even conceding the above reasoning to show that, as between the guilty authors of the collision and the innocent sufferers, the proceeds of the insurance of the guilty vessel do *ex æquo et bono* belong to the latter, it proves only that the latter might recover them in an action for money had and received, or compel an account in equity, but falls far short of proving that such proceeds are embraced under a true construction of the clause in the act of 1851 "*the*

amount or value of the interest of such owner in such vessel and her freight then pending," so as to be taken into the account in computing that amount or value under a decree in an admiralty suit for the purpose of ascertaining the limit of the owner's liability.

But a resort to this argument by the owners of the steamer would be a plain confession that upon the point now under discussion, namely, to whom the prceeds of the insurance belong, *ex æquo et bono*, their contention cannot be maintained; and a denial that the principle of interpretation which that discussion invokes is a just one.

It can scarcely be necessary to stay for the purpose of defending that principle. If the interpretation we are supporting awards these proceeds to those to whom they equitably belong, if it is in harmony with all the rules of the law of public carriers, and is at the same time consistent with the language of the act, Congress certainly cannot be deemed to have intended a different meaning, which either introduces the most flagrant anomalies into the body of the law, or turns over the suitor without reason to a circuitous, inconvenient and uncertain remedy.

8. That the words "interest of such owner in such vessel" do fairly and in frequent use embrace the meaning herein imparted to them has already been sufficiently shown.

9. The circumstance that policies of insurance upon a vessel do not ordinarily pass to the purchaser upon a sale has but little force in the present discussion. This consequence flows from the rather strict common law principle that while a contract is executory the parties to it cannot be changed without the consent of all. It might perhaps have been held otherwise had a marine insurance always been regarded in our law in its true light as a maritime contract. But even in the common law it is the opinion of the best authorities that whenever it is the contempla-

tion of the parties to a marine policy that the insurance should inure to the benefit of others who might become the owners of, or interested in, the subject, it will be regarded as wholly *incidental* to the subject and pass upon any transfer of that subject without special assignment. Now inasmuch as insurance could not legally be made for the direct purpose of indemnifying ship owners for the loss they might sustain in being obliged to pay damages to others for their culpable acts in the destruction of the property, would it be too much to say that whenever the receipt of a loss by them under an ordinary policy would have this effect, an intention will be *imputed* to the parties to the policy that in such cases the indemnity should go, as it ought to go, to the innocent sufferers? It is in accordance with fundamental maxims of jurisprudence never to impute to parties an intent to accomplish an unjust or illegal end; but, on the other hand, to impute to them such a purpose as is consistent with just and equitable results.

Phillips on Insurance, §§ 89, 104.

10. That it would be illegal for the ship owner to directly insure himself against, not the loss of his own property by the culpable neglect of his officers and crew, but the loss sustained by him in paying damages suffered by third persons in consequence of such neglect, must be conceded. The same reason which supports the rule that mariners cannot insure their wages would prohibit any such contract. It would directly impair the motives to diligence.

What cannot be done directly ought not to be permitted indirectly.

Phillips on Ins., § 212.

11. The view for which we contend imputes to Congress the intent to favor the interests of navigation in a two-fold form; *first*, by limiting liability so as to prevent it from being ruinously excessive; *secondly*,

by enabling the ship owner to know *beforehand* the extent of his liability. The sum which he chooses to adventure is made the limit. The vessel, as long as it exists, is the representative of that sum. But the form is wholly immaterial. Insurance is designed to *save* the interest, and when paid does *save* it. Being saved for all material purposes it still *exists.*

12. An analogy may be found in the law of special partnership. The policy of the law has provided that one man may do business through the instrumentality of others and not be chargeable for the debts incurred by them beyond the amount of the investment he ventures. He certainly has an *interest* in the property of the firm, which he may lawfully protect by insurance. But what if the general partners should, without any collusion with the special partner, set fire to the property, and thus destroy the fund to which creditors could resort? Could the special partner, having collected the proceeds of his policy, retain them as against the creditors?

13. It may possibly be objected that the doctrine for which we contend compels the application of the *premium* paid for the insurance to the payment of the damages. One answer to this is, that in estimating the nature of the insurance, for the purpose of ascertaining the extent of the liability, or in making any assignment of it, in order to obtain exemption from further liability, there is no insuperable difficulty in making an allowance or deduction for the premium.

But the better answer is, that the procuring of insurance by the payment of a premium is only a mode of *adding to the value of the subject insured,* which the owner is at liberty to avail himself of or not, as he may choose. *It is a part of the owner's investment* in the adventure. One man might prefer to build his ship of iron instead of wood,

and dispense with insurance; another might think it better economy to build of wood, and expend the additional cost of an iron vessel upon insurance. In either case, the whole amount expended is *invested* in the adventure, and it is the amount of this investment, or what may survive of it, which the law aims at as the limit of liability.

Finally.—Upon the above grounds, it is confidently submitted that, for the purposes of determining the liability of the Navigation Company, the value of the interest of that company in the *Scotland*, if covered by insurance, must be the value of the interest as insured.

The decree appealed from should therefore be reversed, and the cause remanded, with instructions to enter a decree in conformity with directions to be given.

JAMES C. CARTER,
Of Counsel for Appellants.